KEY TO BRIEFS

1 JURISDICTIONAL STATEMENT.

2 MOTION TO AFFIRM THE JUDGMENT AND OR DISMISS APPEAL.

3 APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS AND OR AFFIRM.

4 BRIEF FOR THE APPELLANT.

5 APPELLEE'S BRIEF.

6 BRIEF, AMICUS CURIAE, OF THE AMERICAN CIVIL LIBERTIES UNION.

7 PETITION FOR REHEARING.

8 BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITION FOR REHEARING BY APPELLEE.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]9

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

JURISDICTIONAL STATEMENT.

STANLEY FLEISHMAN,
1741 Ivar Avenue,
Hollywood 28, California,
Attorney for Appellant.

SAM ROSENWEIN and
BROCK, FLEISHMAN & RYKOFF,
Of Counsel.

SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Constitutional provisions and statutes involved 5

Questions presented 6

Statement of the case 8

The federal questions presented are substantial 13

I.

The California ordinance—punishing any person by imprisonment for the innocent possession of an alleged obscene book without intent to sell in an establishment where books are sold or kept for sale—upon its face and as construed and applied to appellant violates the free speech provisions of the First and Fourteenth Amendments and arbitrarily deprives appellant of his liberty and property without due process of law and denies appellant the equal protection of the laws in violation of the applicable provisions of the Fourteenth Amendment 13

II.

The ordinance, as construed and applied to appellant, in the denial by the courts below of all opportunity to prove by competent evidence that the book involved herein was not obscene, violates the free speech provisions of the First and Fourteenth Amendments and arbitrarily and discriminatorily deprives appellant of a fair trial and his liberty and property without due process of law in violation of the applicable provisions of the Fourteenth Amendment 27

PAGE

III.

The standards employed by the courts below under the ordinance for determining the "obscenity" of the book were clearly incompatible with the free speech provisions of the First and Fourteenth Amendments and the due process and equal protection provisions of the Fourteenth Amendment 32

IV.

The judgment of the courts below that the book, "Sweeter Than Life," is obscene under the ordinance clearly violates the free speech and due process provisions of the First and Fourteenth Amendments 37

Conclusion 41

Appendices:

Appendix "A." Opinion of the Appellate Department of the Superior Court, County of Los Angeles, State of California:

Majority Opinion ..... App. p. 1

Dissenting Opinion ..... App. p. 10

Appendix "B." Judgment ..... App. p. 13

Appendix "C." Constitutional Provisions and Statutes Involved ..... App. p. 14

TABLE OF AUTHORITIES CITED

Cases	Page
Ahart, Matter of, 172 Cal. 762, 159 Pac. 160	26
Alberts v. California, 354 U. S. 476	1, 7, 13, 17, 20, 21, 23, 24, 26, 30 35, 39
Besig v. United States, 208 F. 2d 142	7, 10, 34
Boles, Ex parte, 42 Okla. Cr. 28, 274 Pac. 485	25
Bridges v. California, 314 U. S. 252	20, 21
Butler v. Michigan, 352 U. S. 380	7, 17, 34, 35
Cantwell v. Connecticut, 310 U. S. 296	21
Cole v. Arkansas, 333 U. S. 196	34
Grosjean v. American Press Co., Inc., 297 U. S. 233	13, 15
Hannegan v. Esquire, Inc., 327 U. S. 146	40
Herndon v. Lowry, 301 U. S. 242	22
Hicklin (Eng.), L. R. 3 Q. B. 360	7
Hovey v. Elliott, 167 U. S. 409	30
Independent Warehouses, Inc. v. Scheele, 331 U. S. 70	5
Jamison v. Texas, 318 U. S. 413	5
Jones v. Opelika, 319 U. S. 103	15
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495	14, 19
King Manufacturing Company v. City Council of Augusta, 277 U. S. 100	5
Kingsley Books, Inc. v. Brown, 354 U. S. 436	14, 17
Lambert v. California, 355 U. S. 225	5, 25
Lawton v. Steele, 152 U. S. 133	20
Lovell v. Griffin, 303 U. S. 444	14
Marsh v. Alabama, 326 U. S. 501	13, 39
Morgan v. United States, 298 U. S. 468	31
Morissette v. United States, 342 U. S. 246	14, 22

PAGE

Mounce v. United States, 355 U. S. 180, rvrs'g 247 F. 2d 148 ..... 18, 34, 35

Murdock v. Pennsylvania, 319 U. S. 105 15

Nigro v. United States, 4 F. 2d 781 23

One, Inc. v. Olesen, 355 U. S. 371, rvrs'g 241 F. 2d 772 ..... 18, 39

Pennekamp v. Florida, 328 U. S. 331 19

People v. Cole, 113 Cal. App. 2d 253, 248 P. 2d 141 26

People v. Condiotto, 128 Cal. App. 2d 347, 275 P. 2d 500 26

People v. Estreich, 272 App. Div. 698, 75 N. Y. S. 2d 267, aff'd 297 N. Y. 910, 79 N. E. 2d 742 25

People v. Stuart, 47 Cal. 2d 167, 302 P. 2d 5 26

People v. Vogel, 46 Cal. 2d 798, 299 P. 2d 850 26

People v. Wepplo, 78 Cal. App. 2d (Supp.) 959, 178 P. 2d 853 24

People v. Winston, 46 Cal. 2d 151, 293 P. 2d 40 26

Poulos v. New Hampshire, 345 U. S. 395 5

Rex v. Dugdale, 118 Eng. Rep. 499 14

Roth v. United States, No. 582, Oct. Term, 1956, pp. 29, 37-39 .. 39

Roth-Alberts v. United States, 354 U. S. 476 ..... 17, 18, 21, 31, 39, 41

Speiser v. Randall, 78 S. Ct. 1332 22

State v. Laundy, 103 Ore. 443, 204 Pac. 958 25

State v. Prince, 52 N. M. 15, 189 P. 2d 993 25

Stromberg v. California, 283 U. S. 359 34

Sunshine Book Co. v. Summerfield, 355 U. S. 372, rvrs'g 249 F. 2d 114 ..... 18, 39

Sweezy v. New Hampshire, 345 U. S. 234 ..... 19, 22, 40

Thomas v. Collins, 323 U. S. 516 ..... 15, 19

Thornhill v. Alabama, 310 U. S. 88 ..... 19, 20

Times Film Corp. v. City of Chicago, 355 U. S. 35, rvrs'g 244 F. 2d 432 ..... 18, 39

PAGE

Toy v. United States, 319 U. S. 463 ..... 26, 29

United States v. Cardiff, 344 U. S. 174 15

Wieman v. Updegraff, 344 U. S. 183 ..... 21, 22

Winters v. New York, 333 U. S. 507 19

STATUTES

California Constitution, Art. VI, Sec. 5 1

California Penal Code, Sec. 20 26

California Penal Code, Sec. 26(4), (6) 26

California Penal Code, Sec. 311 ..... 24, 26

California Penal Code, Sec. 311(3) 5, 11

Los Angeles Municipal Code, Sec. 41.01 ..... 2, 27

Los Angeles Municipal Code, Sec. 41.01.1 ..... 2, 3, 5, 6, 7, 8, 27

Model Penal Code, Tent. Draft No. 6 (May 6, 1957), pp. 1-2 31

Model Penal Code, Tent. Draft No. 6 (May 6, 1957), pp. 1, 13 20

Model Penal Code, Tent. Draft No. 6 (May 6, 1957), pp. 4, 49 24

Model Penal Code, Tent. Draft No. 6 (May 6, 1957), pp. 31, 44, 45 36

United States Code, Title 28, Sec. 1257(2) 5

United States Constitution, First Amendment 5, 6, 7, 8, 11, 12, 19, 39

United States Constitution, Fourteenth Amendment 5, 6, 7, 8, 11, 12, 19, 39

TEXTBOOKS

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PAGE

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Ellis, Havelock, Studies in the Psychology of Sex (1940), ... 38

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Krafft-Ebing, von, Psychopathio sexualis (N. Y., 1935) 38

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Stekel, Bi-Sexual Love (1933) 38

The Supreme Court and the Right of Free Speech and Press in 93 L. Ed. 1151-1190 15

PAGE

University of Illinois Law Forum (1957), pp. 499, 501-505, Note 17

106 University of Pennsylvania Law Review (1957), pp. 214, 234-239, Paul and Schwartz, Obscenity in the Mails: A Comment on Some Problems of Federal Censorship 17

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, entered and filed June 23, 1958, rehearing denied June 30, 1958. The Appellate Department of the Superior Court is the highest state court available to appellant. (Calif. Const., Art. VI, Sec. 5; *Alberts v. California*, 354 U. S. 476, 481, n. 6.)

Opinions Below.

The opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles was by a divided court (2—1), Swain, J. dissenting in a separate opinion. The said opinions are reported in 161 A. C. A. Supp. 896, 327 P. 2d 636. A copy of the opinions are attached hereto

as Appendix "A." A copy of the judgment appealed from is annexed hereto as Appendix "B." No opinion was rendered by the Appellate Department in denying the petition for rehearing, Swain, J. being of the opinion that the petition should be granted [C. T. 89].[1] The trial court wrote no opinion.

Jurisdiction.

(a) In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, the appellant was charged in a seventeen count complaint [C. T. 21-29] with violations of Sections 41.01 and 41.01.1 of the Los Angeles Municipal Code (Ord. No. 77,000, as amended).

Some of the counts of the complaint were dismissed prior to trial [C. T. 54]. All remaining counts were dismissed at the conclusion of the trial, except Count VII, upon which the trial judge found appellant guilty [C. T. 59].

Count VII of the complaint [C. T. 24] charged that on or about November 19, 1956, appellant violated Section 41.01.1 of the Los Angeles Municipal Code (Ord. No. 77,000, as amended) in that he did wilfully and unlawfully at 518 South Main Street, in the City of Los Angeles, "have in his possession an obscene and indecent writing, book, pamphlet, picture, photograph and drawing, to wit: Sweeter Than Life, in a place of business where magazines, books, pamphlets, papers and pictures were sold and kept for sale." [C. T. 24.]

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[1]The reference "C. T." is to the transcript of the record prepared and certified by the clerk of the court below, and on file in this Court. The opinions are in the transcript at pp. 62-72, and the judgment of affirmance at p. 73.

So far as is pertinent here, the ordinance (Sec. 41.01.1 of the Los Angeles Municipal Code) provides as follows:

"Sec. 41.01.1 Indecent Writings, etc. . . .
Possession Prohibited:

"It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, pictures, photograph, drawing, . . . in any of the following places:

* * * * * * * *

"2. In any place of business where . . . magazines, books, pamphlets, papers, pictures . . . are sold or kept for sale." (App. "A," pp. 1-2.)

Following the judgment of conviction on Count VII, appellant was sentenced to imprisonment in the City Jail of the City of Los Angeles for the term of thirty days [C. T. 59].

The validity of Section 41.01.1 of the Los Angeles Municipal Code, as aforesaid, was drawn in question in the trial court [C. T. 16-20, 32-37, 98-104, 320, 539, 550-551], and in the statement on appeal to the Appellate Department [C. T. 38, 42-44], on the ground of its repugnance to the First and Fourteenth Amendments to the United States Constitution.

The State Court, in affirming the validity of Section 41.01.1, on its face and as applied to appellant and the book "Sweeter Than Life" which appellant possessed, notwithstanding appellant's assertion that the section was repugnant to the United States Constitution, stated:

"1. ". . . . we are of the opinion that a book seller may be constitutionally prohibited from possessing or keeping an obscene book in his store and convicted of doing so even though it is not shown he knows its obscene character, nor that he intends its sale." [C. T. 69.]

2. "Municipal Code Sec. 41.01.1 is more restrictive [than California Penal Code §311] since it eliminates the requirement that a sale be made 'lewdly' and in making it illegal to possess such material in such a place of business, irrespective of a lewd intent to sell it or keep it for sale." [C. T. 67.]

3. "Statutes commonly have forbidden the sale, offering for sale or possession of filthy articles, dangerous or deleterious to the public; or contrary to public morals; or otherwise unlawful; and have placed the duty to know their character upon the possessor . . . The abatement of property used for an unlawful purpose does not depend on the knowledge of the owner . . . So with books." [C. T. 69.]

4. "The ordinance does not violate the First Amendment of the United States Constitution." [C. T. 63.]

5. "A national common denominator of morality may be considerably less than that in a state, which has the right to set, and to adhere to, its own standards in such matters. (U. S. Const. Amdt. X.)" [C. T. 64.]

6. "We reach this conclusion [that the book is obscene], also, when we have considered the book as a whole, under tests that the appellant contends are applicable. There are obvious common-sense limits to the 'over all' view . . . (Cf. *Besig v. United States* (1953), 208 F. 2d 142, 146)." [C. T. 64.]

7. "The characterization as 'obscene' is not too indefinite to constitute a valid standard." [C. T. 63.]

8. ". . . Nor was it error to exclude evidence as to the contents of other books, alleged to be no different or even more sexually titillating, on the theory that legislation is invalid which seeks to 'restrain that which is popular.'" [C. T. 65.]

(b) The opinion and judgment of the Appellate Department were filed and entered on June 23, 1958 [C. T. 62, 73]. The order denying rehearing was filed and entered on June 30, 1958 [C. T. 89]. Notice of Appeal to the Supreme Court of the United States was filed on September 17, 1958 in the Appellate Department of the Los Angeles Superior Court, State of California [C. T. 558(a)].[2]

(c) The jurisdiction of the Supreme Court to review this judgment is conferred by Title 28, United States Code, Section 1257, subdivision 2.

(d) The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *King Manufacturing Company v. City Council of Augusta*, 277 U. S. 100; *Jamison v. Texas*, 318 U. S. 413, 414; *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 79; *Poulos v. New Hampshire*, 345 U. S. 395, 402; *Lambert v. California*, 355 U. S. 225, 227.

Constitutional Provisions and Statutes Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, Section 41.01.1 of the Municipal Code of the City of Los Angeles (Ordinance No. 77,000, as amended) and California Penal Code, Section 311, subdivision 3, are set forth in Appendix "C" hereto.

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[2]Volume 2 of the Clerk's Transcript.

Questions Presented.

This appeal presents the following questions under the Constitution of the United States:

(1) Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, by imposing absolute strict criminal liability for the mere possession of an "obscene" book in a place of business where books are sold or kept for sale, without requirement of proof of the defendant's knowledge of the contents or character of the book or intent to sell, and without regard to proof by defendant of the absence of such knowledge and intent, upon its face and as construed and applied, and the prosecution thereunder of appellant in the instant case, abridges the freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including this appellant of liberty and property without due process of law and arbitrarily denies them the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

(2) Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, upon its face, and as construed and applied to appellant, by the holdings of the courts below that no evidence was admissible in a prosecution under the ordinance on behalf of the appellant to show the artistic, literary, scientific and educational merits of the book named in the complaint; to show what the predominant appeal of the book would be to the average person and the effect on his behavior; to show the degree of public acceptance of the material contained in the book;

and to show the absence of appeal to prurient interest, abridges the freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including this appellant of liberty and property without due process of law and arbitrarily denies them the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

(3) Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, upon its face, and as construed and applied to appellant, by the holdings of the courts below that the unconstitutionally restrictive *Hicklin* (L. R. 3 Q. B. 360) and *Besig* (208 F. 2d 142 (C. A. 9, 1953)), standards for judging the obscenity of a book, to wit, the effect of isolated excerpts upon particularly susceptible persons, were applicable to the book named in the complaint herein, which standards are materially different from the constitutional tests adopted in *Alberts v. California*, 354 U. S. 476 and *Butler v. Michigan*, 352 U. S. 380, abridges the freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including this appellant of liberty and property without due process of law and arbitrarily denies them the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

(4) Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, upon its face and as construed and applied to appellant, by the holdings of the

courts below that the book named in the complaint herein, "Sweeter Than Life," is "obscene" under the Ordinance, abridges the freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including this appellant of liberty and property without due process of law and arbitrarily denies them the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

Statement of the Case.

The judgment sought to be reviewed here is a criminal conviction in one count under Section 41.01.1 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) for the "possession" of an alleged obscene book in a place of business where books are sold and kept for sale.

(a) The case against appellant was as follows: a police officer testified that he "was given a list of books" [C. T. 148]; that he then proceeded to the appellant's business establishment located at 518 South Main Street, in the City of Los Angeles on November 19, 1956 [C. T. 139]; that the officer purchased a number of books and magazines including the book "Sweeter Than Life" [People's Ex. A-1; C. T. 140-142] from a clerk in the store, whom the officer then arrested [C. T. 186]. A clerk from the City Clerk's office produced a copy of a license to do business at the aforesaid establishment issued to appellant [C. T. 165-173].

The appellant testified that he was 72 years of age [C. T. 365]; had been in the book business for about eight years and at the instant place of business for about

two years [C. T. 365]. The books he purchased came principally from New York through the mails [C. T. 366], both new and used [C. T. 368]. Purchases were made usually on the basis of circulars [C. T. 369] or publishers' catalogs [C. T. 373]. There are at least several thousand books in the store [C. T. 368]. Appellant has not read the book here involved [C. T. 366]. It had been some time since he had read a book; it would take him about three months to read one [C. T. 367]. Appellant had no reason to believe that the book contained any objectionable material [C. T. 367], and would not have handled any book or magazine he thought was obscene [C. T. 367]. To the best of his ability, appellant was trying to run a lawful business [C. T. 367].

The appellant offered two witnesses on his own behalf, but their essential testimony, discussed hereafter, was rejected by the trial court, as were offers of proof in connection therewith [C. T. 374-426]. Broadly, the evidence sought to establish that the book involved herein, taken as a whole, applying community standards, does not appeal to the prurient interest of the average person, nor does the book have a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires.

The book "Sweeter Than Life" (the only writing under Count VII, and the only writing upon which appellant was adjudged guilty), is an ordinary size (181 pages) hard cover book. The book was written by Mark Tryon, published in New York, and the frontispiece indicates that the book was copyrighted in 1954 by the publisher.

(b) The trial judge held that the book herein should be tested by its effect on youth [C. T. 434-435, 502]. The

trial judge stated that he was depressed by the reading of the book [C. T. 443] because one of the characters in the book had been a perfectly normal woman at the outset, and after an unwilling experience, had become an entirely altered person [C. T. 442, 519]. The trial court excluded any test of acceptable community standards with relation to theme or description [C. T. 496-498].

The Appellate Department did not discuss the contents or the subject matter of the book. The court held that it shared the conclusion of the trial court that the book was obscene [C. T. 63]. Since the book was "obscene" it was "not constitutionally protected" [C. T. 63]. The argument relative to accepted community standards was dismissed as being simply an argument that "popular" books "may not be suppressed," a view which the court rejected [C. T. 64]. While stating that the court had considered the book as a whole, it held that there were commonsense limits to the "over-all view," citing *Besig v. United States*, 208 F. 2d 142, 146 (C. A. 9, 1953), [C. T. 64].

As noted aforesaid, a majority of the court also held that the municipality could constitutionally prohibit a book seller from possessing or keeping an obscene book in his store, dispensing with all requirements of knowledge or *scienter* [C. T. 69], the ordinance being analogized to those "public welfare" offenses involving adulterated foods, narcotics and abatement of nuisances [C. T. 69].

Not only was the innocent possessor held properly precluded from any defense of lack of knowledge or intent, but he was also held properly stripped of any right to prove by evidence that the book itself was not obscene, measured by community standards [C. T. 63-64].

The court held that the ordinance, on its face and as construed and applied, was not repugnant to the First and Fourteenth Amendments to the United States Constitution [C. T. 63-70].

Swain, J., in dissenting, stated: "It is obvious from a reading of Penal Code sec. 311(3) and the use of 'lewdly' therein that the legislature intended to give all proprietors of book stores throughout the State protection of the *scienter* rule. This is a wise and just provision because those proprietors customarily buy books from advertisements sent out by the publishers. Such dealers order books without an opportunity to read them in advance. I would reverse the judgment" [C. T. 72].

(d) *How the federal questions are presented.*

There was a demurrer to the complaint prior to trial [C. T. 32-37] upon detailed grounds that the ordinance was repugnant to the provisions of the First and Fourteenth Amendments to the United States Constitution. The demurrer was overruled [C. T. 50]. At the commencement of the trial a motion to dismiss and demurrer were again interposed [C. T. 98-104]. Again the claim was made that the ordinances on its face and as construed was unconstitutional because violative of the due process and equal protection provisions of the Fourteenth Amendment. The detailed arguments relative to the omissions of knowledge and intent, the freedom of the material under the free speech provisions of the First and Fourteenth Amendment [C. T. 98-104], all were again renewed. The motion to dismiss was denied, and the demurrer overruled [C. T. 121-122]. At the conclusion of the People's case, a motion to dismiss upon similar grounds was again renewed, and again denied [C. T. 320]. At the conclusion of the entire case, the motion was again

renewed upon similar grounds, and denied [C. T. 539]. A motion in arrest of judgment [C. T. 539, 548-551] upon similar grounds was also denied [C. T. 42].

The Statement on Appeal to the Appellate Department [C. T. 38-45] again detailed the grounds [C. T. 42-44] for urging that the ordinance on its face, and as construed and applied, violated the free speech and press provisions of the First and Fourteenth Amendments as well as the due process and equal protection provisions of the Fourteenth Amendment. As we have recited above, the Appellate Department in its written opinion (Appendix "A") considered and disposed of the aforesaid federal questions. The court recognized that the validity of the ordinance had been drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of the validity of the ordinance [C. T. 62-72]. The petition for rehearing [C. T. 74-88] again pressed the same aforesaid federal questions. The petition for rehearing was denied [C. T. 89]. The notice of appeal to this Court was duly filed and presented the said federal questions for determination by this Court [C. T. 559(a)-(e)].

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.

The California Ordinance—Punishing Any Person by Imprisonment for the Innocent Possession of an Alleged Obscene Book Without Intent to Sell in an Establishment Where Books Are Sold or Kept for Sale—Upon Its Face and as Construed and Applied to Appellant Violates the Free Speech Provisions of the First and Fourteenth Amendments and Arbitrarily Deprives Appellant of His Liberty and Property Without Due Process of Law and Denies Appellant the Equal Protection of the Laws in Violation of the Applicable Provisions of the Fourteenth Amendment.

In *Alberts v. California*, 354 U. S. 476, 488, this Court stated: "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." The question presented in the case herein is whether the municipality has not opened "the door" far wider than this Court deemed constitutionally permissible in *Alberts*, and arbitrarily intruded into areas of speech and press protected from all governmental infringement by the provisions of the First and Fourteenth Amendments. (*Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 245; see also, *Marsh v. Alabama*, 326 U. S. 501, 511.)

A. By the terms of the ordinance herein, and as construed and applied by the courts below, the municipality has made every proprietor of an establishment where books and writings are kept for sale the absolute gurantor of the sexual purity of the books which he has in his possession, and subjected him to the penal sanction of imprisonment for unknowing and unintentional violation of the guarantee imposed upon him by the municipality. The admonition of Mr. Justice Douglas in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 447 has been ignored: "Free speech is not to be regulated like diseased cattle and impure butter."[3]

Despite the conclusion of the courts below that the quality of books, pamphlets, magazines and all other writings can be regulated by the State like the quality of fish and fowl, *the fact is* that the aforesaid have quite different social, political and constitutional significance. The liberty of the press includes not only the liberty to publish books, both "informing" and "entertaining" (*Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501), but also the liberty to circulate and distribute such books to the general public. (*Lovell v. Griffin*, 303 U. S. 444, 452.)

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[3] So far as research by counsel has been able to discover, this appears to be the first ruling in an American appellate court applying the rule of strict criminal liability to the mere possession of an alleged obscene book in an establishment where books and other writings are kept for sale. Professor Sayre's extensive compilation reveals no such offense. Sayre, *Public Welfare Offenses* in 33 Columbia L. Rev. 54, 84-88 (1933). At common law, a charge merely of possession of an "obscene" writing, even with intent to publish, was not an offense. *Rex v. Dodd*, 118 Eng. Rep. 490 (1853). Here, possession of an alleged "obscene" book is punishable without intent to sell it [C. T. 69]. In *Morissette v. United States*, 342 U. S. 246, Mr. Justice Jackson commented that the so-called "public welfare offenses" do "not fit neatly into any of the generally accepted classifications of common law offenses, such as those against the State, the person, property, or *public morals*" (at p. 255). (Emphasis added.)

The ordinance herein, specifically made applicable to all proprietors of establishments where magazines, books, pamphlets and papers are kept for sale necessarily tends to place burdens and restrictions upon the exercise of the freedoms of speech and press protected by the fundamental law. In this connection, it should be noted that the First Amendment's safeguards are applicable "to business or economic activity." (*Thomas v. Collins*, 323 U. S. 516, 531.)

B. The burdens, moreover, which the ordinance here, on its face and as construed and applied to appellant, places upon the exercise of the freedoms of speech and press are highly restrictive and virtually impossible to assume. The ordinance operates, it is respectfully submitted, as a far greater restraint on the circulation of the press than the statutes and ordinances which this Court struck down in *Grosjean v. American Press Co., Inc.*, 297 U. S. 233; *Jones v. Opelika*, 319 U. S. 103; and *Murdock v. Pennsylvania*, 319 U. S. 105, to cite only a few of the many cases where restrictions upon the exercise of freedom of speech and press have been invalidated by this Court. (See, Note, *The Supreme Court and the Right of Free Speech and Press* in 93 L. Ed. 1151-1190.) Whether a form of restraint be taxation, or a modern facsimile of the "ancient laws of Caligula" (*United States v. Cardiff*, 344 U. S. 174, 176), this Court has emphasized the importance of safeguarding the fundamental historical rights against unwarranted intrusions.[4]

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[4] "The evils to be prevented were not the censorship of the press merely, *but any action of the government* by means of which it might prevent such free and general discussions of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley's *Constitutional Limitations* (8th ed.), p. 886 quoted in *Grosjean v. American Press Co., Inc.*, *supra*, at pp. 249-250. (Emphasis added.)

Thus, the ordinance here sweeps within its orbit, firstly, every form of communication—writings, books, pamphlets, magazines, papers, pictures, photographs and drawings. Secondly, the ordinance encompasses the proprietor of every establishment where such media of communication are sold or kept for sale. The ordinance, therefore, places in jeopardy at least the owners of regular book shops and stores; the proprietors of department stores where books are sold or kept for sale; the proprietors of college book stores; the owners of chain drug stores and markets where books are frequently kept for sale; the proprietors of newspaper stands, and a host of small, individual proprietors of stationery stores who keep books, pamphlets and magazines for sale.

The ordinance, on its face and as construed and applied, throws upon the proprietor the absolute duty to know the contents of every book and writing in his establishment. The liability is absolute, regardless of how much good faith existed or how many reasonable precautions were taken. Under present day conditions, the burdens thus cast upon proprietors of establishments where books and writings are kept for sale become a sheer physical impossibility. Indeed, it appears altogether unreasonable to demand so near an approach to omniscience.

The aforesaid burdens, however, are greatly increased when it is considered that the proprietor is required to know, as the appellant here in his establishment of more than 2,000 books was required to know, whether each and every book is "obscene." It is not the price of the book, nor the quality of its paper with which the proprietor is required to be familiar, but knowledge of the sexual purity of the contents of each and every book is the burden of the proprietor.

The opinions of the various Justices of this Court in *Butler v. Michigan*, 352 U. S. 380, in *Roth-Alberts v. United States*, 354 U. S. 476, and *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, reflect, it is respectfully submitted, the vital difficulty of even reaching a standard or test for "obscenity" which will "safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." (*Alberts v. California*, *supra*, at p. 488.)[5] Moreover, the application of one, or more, tests of "obscenity" to individual books is plainly a task of great magnitude for the proprietor of a book shop. Determining whether a book, as a whole, has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires," or whether a book is "calculated" to corrupt or debauch, or whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (*Alberts v. California*, 354 U. S. 476,

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[5]Subsequent discussion of the *Roth-Alberts* decision reflects uncertainty among the legal writers as to the precise scope of the recently formulated test for "obscenity"; whether or not the test is the same or different from the tests imposed by the state courts in *Alberts* or the trial judge in *Roth*. See, Note, *The Supreme Court and Obscenity*, 11 Vand. L. Rev. 585, 591-592 (1958); Note, 60 W. Va. L. Rev. 89, 91 (1957); Note, De Paul L. Rev. 111, 113 (1957); Note, University of Ill. L. Forum (1957), 499, 501-505; Paul and Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship* in 106 Univ. of Pa. L. Rev. 214, 231-239 (1957); Note, *Obscenity and the First Amendment: The Search for an Adequate Test* in 7 Duke L. J. Rev. 120 (1958). See also, the three theories relative to the significance of the *Roth-Alberts* tests advanced by Professor Louis B. Schwartz, Associate Reporter for the Model Penal Code in 29 Penn. B.A.Q. 8, 10-11 (1957).

486, 489, 495), is a perplexing and baffling problem, sometimes unsolved until this Court has spoken.[6]

In *Roth-Alberts*, the majority opinion admonished that, in applying the tests for obscenity, "sex and obscenity are not synonymous," and that "the portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press" (at p. 487). Mr. Chief Justice Warren stressed the "nature of the materials" in the context of lewd "conduct" from which the materials "draw color and character" (at p. 495). Mr. Justice Harlan stated that the question of the obscene character of a work "involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind" (at p. 498). Mr. Justice Harlan also doubted that "obscenity" was as "distinct, recognizable, and classifiable as poison ivy. . . ." (at p. 497).

Clearly, in the light of all the aforesaid, enforcement of this rule of absolute strict liability with sentences of imprisonment against concededly innocent and good faith

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[6]See, for example, *Times Film Corp. v. City of Chicago*, 355 U. S. 35, reversing the opinion and judgment in 244 F. 2d 432 (C. A. 7, 1957). The Court of Appeals had held that the film "The Game of Love" was "obscene" and "immoral", concurring in similar findings of the "judge of the district court, the police commission and the persons whom he caused to inspect the film." *Supra*, at p. 436. See also, *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, reversing the opinion and judgment in 249 F. 2d 114 (C. A. D. C., 1957) (magazines containing photographs of naked men, women and children, and advocating nudism); *One, Inc. v. Olesen*, 355 U. S. 371, reversing opinion and judgment in 241 F. 2d 772 (C. A. 9, 1957) (magazine containing articles described by the Court of Appeals as "nothing more than cheap pornography calculated to promote Lesbianism." *Supra*, at p. 777). And see also, *Mounce v. United States*, 355 U. S. 180, reversing upon confession of error, the opinion and judgment in 247 F. 2d 148 (C. A. 9, 1957).

proprietors can only have the tendency to restrict the circulation and sale of all books and writings. For many proprietors, unwilling to bear the risks of imprisonment and stigma, its enforcement only can mean the closing of their establishments. For others, it means a process of self-censorship, so broad as to satisfy the whims of every minor politician and official, as well as the various private groups organized to combat literature that offends their sensibilities and for whom such an ordinance as the one herein easily lends itself to indiscriminate censorship. See, Lockhart and McClure, *Literature, The Law of Obscenity, and The Constitution* in 38 Minn. L. Rev. 295, 302-320 (1954). In the ultimate sense, the only result of the enforcement of the ordinance is to sharply restrict the communication of ideas of all kinds and nature, and to limit the right to speak and write (as well as the right to hear and read) to only that which has "official" approval.

It is submitted that the inhibiting effect of the ordinance upon the exercise of the freedoms of speech and press is therefore so grave as to do violence to the provisions of the First and Fourteenth Amendments guaranteeing the protection of these indispensable liberties. (See *Thornhill v. Alabama*, 310 U. S. 88, 101-102; *Thomas v. Collins*, 323 U. S. 516, 531; *Pennekamp v. Florida*, 328 U. S. 331, 346; *Winters v. New York*, 333 U. S. 507, 510; *J. Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501; *Staceey v. New Hampshire*, 345 U. S. 234, 247-248.)

C. In support of the ordinance, the court below held that the aforesaid abridgments of fundamental rights are justified "to protect the public morals," that such legislation "preeminently falls within state police power" (Appx. "A," p. 3). It is submitted, however that an ordinance

which in operation and effect, substantially diminishes or tends to diminish the flow of free expression cannot be justified by recourse to the label of "police powers." (See, *Thornhill v. Alabama*, 310 U. S. 88; *Bridges v. California*, 314 U. S. 252.)

Moreover, the justification for resort to such an ordinance as the one involved here to "protect the public morals" cannot rationally be maintained, it is respectfully submitted. As was stated in *Lawton v. Steele*, 152 U. S. 133, upon which the court below relied: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are *reasonably necessary* for the accomplishment of the purpose, and *not unduly oppressive* upon individuals. The legislature may not, under the guise of protecting the public interests, *arbitrarily interfere with private business*, or impose *unusual and unnecessary restrictions* upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." (*Supra*, at p. 137; emphasis supplied.)

(1) The ordinance here does not deal with the indiscriminate sale or distribution of obscene books through the mails, or throughout the state or locality. There is involved no broad-scale "commercial exploitation of the marked and shameful cravings for materials with prurient effect" (*Alberts v. California*, 354 U. S. 476, 496); no "pandering" or "dissemination" or "sale" or "distribution" is involved. (American Law Institute, *Model Penal Code*, Tent. Draft No. 6 (May 6, 1957), pp. 1, 13.) What the

municipality, punishes here with imprisonment is mere innocent possession of an "obscene" book in a book shop.

The municipality has given no indication in the ordinances of any specific danger to "public morals" from innocent possession which justify such broad restrictions upon fundamental rights as posed by this ordinance. *Bridges v. California*, 314 U. S. 252, 264.) Mere possession of a book is the opposite of "purveying" or "assaulting" the sensibilities of an unwilling listener or reader. The average adult goes to a book shop ordinarily to purchase what he has already decided to read, or to "browse." Clearly, the dangers to the morals of a society under such circumstances are fairly minimal compared to the intrusions which the law here makes into the areas of liberty and property. (*Cf. Cantwell v. Connecticut*, 310 U. S. 296, 307, 311.)

(2) Essentially justification for the ordinance was placed simply on the municipality's alleged power to abolish all requirements of *scienter* as in the case of "public welfare offenses" involving adulterated food, narcotics, false weights and measures, etc. (Appx. "A," p. 8.)

It is submitted that "knowledge and intent" cannot so lightly be eliminated from a statute where the subject matter affected are writings and communications protected ordinarily from abridgment by the Constitution. Every one of the cases cited by the majority opinions in *Alberts*, upholding the statute as against a claim of indefiniteness, were based on the express or implicit requirement found in the various statutes of "knowledge and intent." (354 U. S. 476, 492.) Mr. Chief Justice Warren predicated his concurrence in *Roth-Alberts* on the presence of *scienter*. (354 U. S. 476, 494-496.) In *Wieman v. Updegraff*, 344 U. S. 183, this Court stated: "Yet under the Oklahoma

Act, the fact of association alone determines disloyalty and disqualification, it matters not whether associations existed innocently or knowingly. *To thus inhibit individual freedom of movement is to stifle the "flow of democratic expression and controversy at one of its chief sources."* (*Supra*, at p. 191; emphasis supplied.) In *Sweezy v. New Hampshire*, 354 U. S. 234, 248, this Court spoke of the inhibiting effect of a state sanction "in the flow of democratic expression and controversy" where the sanction was "drawn without regard to the presence or absence of guilty knowledge in those effected." (See also, *Speiser v. Randall*, 78 S. Ct. 1332, 1339.)

The ordinance here, which indiscriminately punishes the innocent and the guilty alike, in an area affecting speech and press, should fall "as an assertion of arbitrary power" (*O'Meara v. Palmquist*, *supra*, at p. 191), and as a restraint upon the free exercise of constitutional rights. (*Herndon v. Lowry*, 301 U. S. 242, 259.)

(3) Moreover, it is entirely arbitrary and capricious, as well as unreasonable, to attempt to assimilate the innocent possession of an alleged "obscene" book with the so-called "public welfare offenses" directed generally against the sale and distribution of adulterated foods, narcotics and intoxicating liquor. The ordinance here has not been enacted for the protection of the revenue, nor is it merely a summary mode of enforcing a civil right. Nor does the ordinance involve a public nuisance, where the proceeding although in form criminal, is substantially in the nature of a civil proceeding.[7]

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[7] See Mr. Justice Jackson's review and criticism of the *Dotterweich* and *Wurzbach* decisions in *Morissette v. United States*, 342 U. S. 246, 258-260. The opinion states that in "public welfare offenses" the accused "usually is in a position to prevent" the violation, the penalties "commonly are relatively small" and "convic-

If a proprietor of a grocery store or pharmacy sells narcotics or adulterated meat, whether or not the proprietor is aware of the adulteration or taint, the purchaser is in fact defrauded and the public health generally endangered. Even without a statute, the proprietor is civilly liable to the customer, no matter how innocent he may be. There may be nothing unreasonable in clothing what is already a civil wrong with the penal consequences of a nominal fine. The entire object of such statutes is not to punish criminal or immoral conduct but to regulate trade and to protect the public from unwholesome food.

But a prison sentence for the possession of an "obscene" book in a book shop is in an entirely different category. Here the purchaser of the book, or the "browser," is not an unwitting member of the public unable to protect himself. The average adult who purchases, or reads, a book in a book shop is ordinarily more familiar with the contents and characteristics of the book than the proprietor. The groceryman needs only to use available scientific instruments to determine the purity of his meat; the book seller has to make evaluations relative to the psychological "appeal" of the book and the "effect" of the book for which concededly there are no available scientific data. (*Alberts v. California*, 354 U. S. 476, 501-502.)

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tion does for grave damage to an offender's reputation" (*supra*, at p. 25[illegible]). Moreover, the Justice added: "Neither this Court, nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We cannot say the law on the subject is neither settled nor static" (*supra*, at p. 260). See *Morissette v. United States*, 342 U. S. 246, 260-261 (72 S. Ct. 240, 96 L. Ed. 288), 1952, after the decision by this Court in *Balint*, holding that the reasoning of *Balint* would not apply to an innocent purchaser of narcotic drugs who might "have to order them from distant points" (*supra*, at p. 785).

Moreover, this ordinance is ostensibly passed to punish criminal conduct which it is alleged may result in the corruption of public morals. It appears highly harsh and unreasonable to punish as immoral and criminal an act which is merely the passive act of possession without the slightest element of guilty knowledge or criminal intent. Conviction of a proprietor of a store for mistakenly selling adulterated meat bears no stigma; but conviction for possessing "obscene" literature, no matter how innocently, necessarily carries a life-time stigma, even greater than the prison sentence imposed. It would appear abhorrent to American principle to imprison persons for the mere possession of an alleged "obscene" book without conscious wrongdoing. Clearly, the language of Mr. Chief Justice Warren would be applicable here: "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture." (*Alberts v. California*, 354 U. S. 476, 495.)[8]

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[8]There is considerable doubt among the text writers as to whether abolition of the requirements of *scienter* in the ordinary criminal statute, beyond sumptuary and regulatory measures, can be squared with the due process provisions of the Constitution. See, Mueller, *On Common Law Mens Rea* in 42 Minn. L. Rev. 1043, 1104 (1958); Laylin and Tuttle, *Due Process and Punishment* in 20 Mich. L. Rev. 614 (1922); Sayre, *Public Welfare Offenses* in 33 Col. L. Rev. 55, 78 (1933); Wechsler, *The American Law Institute—Some Observations on Its Model Penal Code* in 42 A. B. A. J. 321, 323-4 (April, 1956). The American Law Institute proposes a shift in the burden of proof thus relieving the prosecutor initially, but permitting the accused to prove lack of a lewd intent. The Institute states: "Under prevailing obscenity laws, the prosecution must prove that defendant knew or, at least, was reckless as to the presence of objectionable material in a book or other publication disseminated by him." *Model Penal Code*, Tent. Draft No. 6, May 6, 1957, pp. 4, 49. This is, of course, the policy of the State of California (Penal Law, §311; *People v. Wepplo*, 78 C. A. 2d (Supp.) 959, 178 P. 2d 853), which the municipality has decided to ignore.

(4) How arbitrary the ordinance is can be gleaned from the fact that not only is the accused's lack of knowledge of the objectionable contents of the book, or his lack of intent to sell such a book, excluded from consideration, but the accused cannot prevail even if he never read the book and didn't know its contents [C. T. 366]. In *Lambert v. California*, 355 U. S. 225, this Court had before it "a person, wholly passive and unaware of any wrongdoing" brought to the "bar of justice for condemnation in a criminal case" (p. 228). There was no opportunity to avoid the penalty of the law, even though "default was entirely innocent" (p. 229). This Court held "that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand . . . Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it . . . he may not be convicted consistently with due process" (pp. 229-230). It is submitted that the principles of *Lambert* are even more applicable here where enforcement of the law may result in a diminution of fundamental rights of speech and press. (See also, *Ex parte Boles*, 42 Okla. Cr. 28, 274 Pac. 485, 486; *State v. Prince*, 52 N. M. 15, 189 P. 2d 993, 996; *People v. Estreich*, 272 App. Div. 698, 75 N. Y. S. 2d 267, 270, aff'd 297 N. Y. 910, 79 N. E. 2d 742; *State v. Laundy*, 103 Ore. 443, 204 Pac. 958, 976-977.)

(5) Moreover, the discriminatory and capricious aspects of the ordinance are emphasized when it is considered, as does the dissent below [C. T. 72], that the legislature of the State of California "intended to give all proprietors of book stores throughout the State protec-

tion of the scienter rule" [C. T. 72]. California has had a requirement of "lewd intent" for almost 100 years in its obscenity laws (see West's Calif. Penal Law, Sec. 311, and historical note thereunder).[3] There is no indication that the requirement of scienter has in any way impaired enforcement of the statute. (See, *Alberts v. California*, 354 U. S. 476. See also, *Tot v. United States*, 319 U. S. 463, 467-470.)

The arbitrary and discriminatory enforcement of the law is further emphasized when it is considered that California does not even punish the innocent possession of narcotics or liquor, or a reasonable mistake in the filling of a prescription or a bona fide belief that one is free to remarry. (See, *People v. Vogel*, 46 Cal. 2d 798, 299 P. 2d 850; *People v. Winston*, 46 Cal. 2d 151, 293 P. 2d 40; *People v. Stuart*, 47 Cal. 2d 167, 302 P. 2d 5; *Matter of Ahart*, 172 Cal. 702, 159 Pac 160; *People v. Cole*, 113 Cal. App. 2d 253, 248 P. 2d 141; *People v. Condiotto*, 128 Cal. App. 2d 347, 275 P. 2d 500.)

For all of the aforesaid reasons, it is submitted that the ordinances here imposing strict criminal liability upon the innocent proprietor of an establishment where books are kept for sale, for the mere possession of an alleged "obscene" book, without intent to sell, raises substantial federal questions which this Court should review.

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[3]See also, Calif. Penal Code, Section 20, and Calif. Penal Code, Section 26, subdivisions 3 and 6.

II.

The Ordinance, as Construed and Applied to Appellant, in the Denial by the Courts Below of All Opportunity to Prove by Competent Evidence That the Book Involved Herein Was Not Obscene, Violates the Free Speech Provisions of the First and Fourteenth Amendments and Arbitrarily and Discriminatorily Deprives Appellant of a Fair Trial and His Liberty and Property Without Due Process of Law in Violation of the Applicable Provisions of the Fourteenth Amendment.

The appellant offered as witnesses in his behalf the testimony of one Robert R. Kirsch, the book review critic of the Los Angeles Times, a newspaper of general circulation in the City of Los Angeles, and the testimony of Dr. Zoltan Gross, a clinical psychologist, with offices located in the City of Beverly Hills, State of California [C. T. 374-426].[10] The abundant qualifications of the aforesaid witnesses were undisputedly established [C. T. 377-381, 398-414].

Based upon his described education, training, teaching, experience and work, the witness Kirsch expressed himself as familiar with contemporary community literary

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[10]Prior to the trial herein, there has been another trial of another accused before the same trial judge, and a jury, involving the said §§ 41.01 and 41.01.1 of the Los Angeles Municipal Code [C. T. 47-52]. The aforesaid witnesses, Kirsch and Gross, were called and qualified but their testimony was rejected [C. T. 382, 390; 415, 424]. Offers of proof were made [C. T. 391-396, 425-426] and also rejected. Immediately thereafter, the case herein was tried before the same trial judge without a jury and with the same counsel [C. T. 53-61]. It was stipulated herein that if the same witnesses had been called their testimony with respect to the book herein would be similar, and would again be rejected; as would the offers of proof [C. T. 374].

standards [C. T. 381-382]. When asked to state what these standards were [C. T. 382], the trial court sustained an objection by the prosecutor [C. T. 282, 390]. It seemed to the trial judge that "persons of very limited knowledge and understanding would not have to have an expert tell them something that they have read is a very bad thing to read and what effect this thing would have upon them" [C. T. 383]. The "intent of the ordinance," according to the trial judge, was to protect "groups of the people who might not use good judgment and prudence in what they read" [C. T. 384], and the testimony of the witness as to contemporary community standards was therefore irrelevant and inadmissible.

The appellant offered to prove by the witness that the book was within commonly accepted community standards; that the book had literary merit and served a useful social purpose; that in the past decade, the community standards had changed to reflect a broader and more tolerant discussion of sex matters; that the witness had with him a number of literary works currently being sold extensively throughout the country and described as "best sellers" which were comparable in depiction and representation to the book herein, from all of which the witness concluded that the work herein involved does not appeal to prurient interests of the average person, applying contemporary community standards [C. T. 391-394].

Dr. Gross, following the description of his educational background, his experience and training [C. T. 398-415] was not permitted to testify as to whether the scientific methods he used as a psychologist would shed light on whether a particular book was within or without community standards [C. T. 415], its effect on average people [C. T. 433], nor his opinion concerning contem-

porary community standards relative to sexual behavior and sexual discretion [C. T. 424]. The appellant offered to prove that the witness would testify that he was familiar with present day community standards regarding sexual behavior and sexual expression; that the work involved did not go beyond such standards; that there was no way of stating with certainty whether the material would have a substantial tendency to corrupt and deprave its readers by arousing lascivious thoughts or lustful desires; but that within the bounds of reasonable phychological certainty, the work did not fall into the category of being able to corrupt or deprave its readers [C. T. 425-426].

In rejecting the testimony and offer of proof, the trial judge held that it was for the trier of the facts as a reasonably prudent person to render all the aforesaid opinions of the book; that a scientific opinion different from the conclusion which a jury might reach was irrelevant and immaterial [C. T. 419]. The Appellate Department below, concurred in these views [C. T. 63-64].

It is axiomatic that a State cannot, consistent with the due process requirements of the Fourteenth Amendment, "command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible." (*Tot v. United States*, 319 U. S. 463, 469.) Nor can it be denied that the power of a State to prosecute for an alleged violation of a criminal law is inseparable from a constitutional right to defend. To deny an accused the opportunity to present relevant evidence in his own behalf "is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and aggres-

sion. . . . Can it be doubted that due process of law signifies a right to be heard in one's defense?" (*Hovey v. Elliott*, 167 U. S. 409, 414, 417.)

Not only has the municipality here deprived appellant of all defenses which would establish lack of personal guilt, but appellant has been stripped of all opportunity to prove by evidence that the book is not "obscene." All that happened in this trial, in legal effect, was that the prosecution handed the book to the trial judge; he read it; he didn't like it; the appellant was sentenced to imprisonment.

But when this Court decided *Alberts*, it held that "obscenity" was now not merely a matter of law, but necessarily included decisions on *factual elements* before a ruling could be made. For the first time, this Court definitively held that sex and the portrayal of sex is not synonymous with obscenity; only material dealing with sex *in a manner appealing to prurient interest* is "obscene." (354 U. S. 476, 487.) More important, this Court held that "obscenity" cannot be determined solely from the nature of the material, but that the question of customary freedom of expression had to be considered. This Court stated that the book was to be tested by *contemporary community standards*. (354 U. S. 489, and fn. 20 on p. 487.)

The aforesaid questions, it is submitted, are *fact questions* to be decided by the trier of the facts. Yet the courts below would not permit appellant to put in evidence on these factual issues. Apparently, the court below assumed that the trial judge was the "community," and, as such, alone equipped to determine the "appeal to prurient interest" of the writing. But this view essentially erases

the factual issues, and turns the question of obscenity to be decided by the court, or by the jury, into a matter of *ad hoc* legislation only.

Prior to the *Roth—Alberts* decisions, where acceptable community standards had not yet become an essential factual element of the test for obscenity, consideration of evidence on this issue may have depended on the grace of the particular courts. In the light of the definition, however, adopted by this Court in *Roth—Alberts* to meet constitutional requirements, it is submitted that an accused can no longer be deprived of his right to show by competent evidence, as was the evidence here, what are *in fact* the contemporary community standards and what is, *in fact*, the appeal of the particular material measured by such community standards. The question here should not be confused with the question of whether the trier of fact is better equipped than the witnesses to decide an issue of fact; the real question is whether the accused shall be permitted *to submit evidence* on which the trier can decide the issue. If the one who determines the facts which underlie the judgment of conviction has not considered relevant evidence, it appears clear that a trial has not been had. (*Morgan v. United States*, 298 U. S. 468, 481.)

The American Law Institute, of course assumes that its definition of "obscenity," which is no different than the one adopted by this Court, requires opportunity for an accused to present evidence on that issue. *Model Penal Code*, Tent. Draft No. 6 (May 6, 1957), 1-2. The Institute states that the provisions of the Code are "designed to assure reception of such expert testimony, as well as all other information, bearing on the issue of obscenity . . ., admitting evidence of public acceptance . . .

is . . . relevant under our definition of obscenity to show that the material went beyond 'customary limits of candor.' *For example, a book could hardly be obscene in one county of a state if it appeared openly on public library shelves and in book stores throughout the state.*" (*Supra*, at p. 44; emphasis added.) (See also, American Law Institute, *Proceedings*, 34 Annual Meeting, May, 1957, pp. 158, 174, 187, 194, 202.)

III.

The Standards Employed by the Courts Below Under the Ordinance for Determining the "Obscenity" of the Book Were Clearly Incompatible With the Free Speech Provisions of the First and Fourteenth Amendments and the Due Process and Equal Protection Provisions of the Fourteenth Amendment.

The standards adopted by the trial judge in determining that the book herein was not entitled to constitutional protection were as follows: "As we know, youth has an inquiring mind in everything. . . . And because of that the police measures for public safety and morals and health, under which the theory of this ordinance was passed, must do its work, as I see it, and it can't be applied to those who are already vaccinated, you might say, by experience and by time" [C. T. 434-435]. According to the trial judge, the trier of the fact is "a thermometer, so to speak, measuring the heat or quality of the thing" [C. T. 435]. The court or jury is like a "measuring instrument . . ." [C. T. 440].

The book began, according to the trial judge, showed that "the young woman in that case was a perfectly normal woman and after the experience became a perfectly

abnormal woman. Now if that isn't acting upon a normal mind, that kind of a plot, I don't know anything that is. And we do know, sir, we unfortunately have had many years of contact from time to time with this and we do know that a perfectly normal person, that on certain occasions being subjected to certain things become changed and altered. . . . And that book there, I thought, was a perfect illustration of a normal person, one whose thoughts were entirely different, had never entered upon that field, upon being subjected to it forcibly became an entirely altered person. The book, I thought, carried its own proof. And I cannot contemplate you or anyone else or myself reading beyond a certain portion of it if we didn't have to do it because of some duty to perform" [C. T. 442]. "I was depressed, sir. I was depressed, very depressed" [C. T. 443].

The trial judge appeared to exclude any test of accepted community standards. Whether the book herein in any way went substantially beyond customary limits of candor in description or representation of relevant and integral matters did not concern the court. References to such works as "Peyton Place," well known for its wide public acceptance [C. T. 490-498] were dismissed as follows: "May I ask you, is that supposed to be a standard for people to write by? It isn't a law. It is a mere example of what I would say might be another violation. I don't know what the purpose of the book was . . . certainly not a standard for us" [C. T. 498].

Stated the trial judge: "There was a writer of material of that kind who had a very wide circulation. She herself, in one of her latest books before she passed from the scene—a great authoress—described the effect of that

material on young people. It was a description that is a standard description" [C. T. 502].[11]

The Appellate Department below, plainly confronted by the trial judge's use of the "unconstitutionally restrictive" *Hicklin* test (354 U. S. 476, 489), proceeded to label the book as obscene under "any test" (Appx. "A," p. 2), —but the court indicated that it was basing its ruling on the *Hicklin* test when it stated that there were "obvious common-sense limits to the 'over-all' view" (Appx. "A," p. 3), relying on *Besig v. United States*, 208 F. 2d 142, 146 (C. A. 9, 1953).[12] The Appellate Court could only affirm on a *Hicklin-Besig* theory because the trial court (sitting as a jury) convicted solely on that basis. (*Cole v. Arkansas*, 333 U. S. 196; *Butler v. Michigan*, 352 U. S. 380; *Mounce v. United States*, 355 U. S. 180; *Stromberg v. California*, 283 U. S. 359.)

In three important respects, it is respectfully submitted, the courts below applied unconstitutional standards in determining that the book herein is not entitled to be read by the people.

1. It is clear that the trial judge found the book "obscene" because in his opinion the book was not one which youth should read [C. T. 434, 502]. At the same time, the trial judge made it clear that he was not measuring the book by the standards of the average normal person, "already vaccinated, you might say, by experience and time" [C. T. 435]. Such a standard, approved by the

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[11]Upon argument, the prosecutor briefly replied to appellant's counsel by asserting that counsel's argument "appears to be, that these book merchants are a lot more important people than any children" [C. T. 513].

[12]The *Besig* decision is commonly understood as adhering to the *Hicklin* rule. See *Note*, 7 Duke L. J. 116, 119, n. 17 (1958).

llate court, "arbitrarily curtails one of those liberties
he individual, now enshrined in the Due Process Clause
he Fourteenth Amendment, that history has attested
he indispensable conditions for the maintenance and
gress of a free society." (*Butler v. Michigan*, 352
S. 380, 384. See also, *Alberts v. California*, 354 U. S.
, 489.)

. The trial court, with the approval of the Appellate
partment, disregarded the "dominant theme of the
erial" (354 U. S. 476, 489). No finding was made by
her court that the predominant appeal of the book, con-
ered as a whole, is to prurient interest, or that the
k had a substantial tendency to corrupt or deprave the
rage person (354 U. S. 476, 487, n. 20). On the
trary, the explicit view of the trial court was that the
k was *ipso facto* "obscene" because a character in the
k had been corrupted, and remained so [C. T. 442];
ll the works of literature which depict the fall of man
m grace were condemned to the bonfire, very little
uld remain for the reading public.

The Solicitor General of the United States has conceded
t a book is not "obscene" because it "offends the sense
propriety, morality and decency" of the average person.
ch a test "depends upon offenses to higher level feelings
her than the affirmative promotion of baser ones." See,
emorandum of United States in *Mounce v. United*
tes, 355 U. S. 180, reversing, upon confession of error,
judgment of conviction in 247 F. 2d 148 (C. A. 9,
57).

3. Both courts declined to apply, as a test for "ob-
nity," contemporary community standards. (354 U. S.
, 489.) In other words, both courts excluded from
nsideration whether the book "goes substantially beyond

customary limits of candor in description or representation" (354 U. S. 476, 487, n. 20). The courts below appeared to believe that such an element, if considered, would mean that no "popular" book could be found "obscene" (Appx. "A," p. 3).

Clearly, such view is based upon a fallacious premise. The element of "contemporary community standards" was made a part of the test of "obscenity" to ensure that material dealing with sex, in art, literature and scientific works, should be protected from official suppression. Evidence relative to "contemporary community standards" is not offered to prove that other alleged "obscene" books are "popular"; the evidence is offered to show that the sensibilities of the public, for whose benefit "obscenity" statutes are ostensibly enacted, is not offended by material of a comparable character in theme and depiction. Such evidence establishes that the material does not go beyond "the present critical point in the compromise between candor and shame at which the community may have arrived here and now". (American Law Institute, *Model Penal Code*, Tent. Draft No. 6 (May 6, 1957), pp. 31, 44, 45.)

Thus, the ordinance, here as construed and applied arbitrarily strips the appellant of all *scienter* defenses; prevents him from adducing evidence to show that the book is not obscene; and even permits judgment as to the obscenity of the book on capricious standards totally inconsistent with constitutional guarantees.

IV.

The Judgment of the Courts Below That the Book, "Sweeter Than Life," Is Obscene Under the Ordinance Clearly Violates the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

In a frontispiece to the book, the author sounds the dominant theme of the material: "Revenge is sweeter Than Life Itself. So Think Fools." The quotation is from Juvenal's Satires. The emptiness of a life dedicated solely to revenge for fancied or real injuries is depicted through the life of the character, Nym Randolph O'Sullivan. Nym appears to have been born a normal child, but her earliest recollections are only guilt feelings because her father "wanted a son" (p. 25) and "felt cheated by his wife" (p. 26). Even "Nym's mother hated the child" (p. 27). Compelled to live solely with her mother following her father's death, Nym finds herself subjected to this unreasoning hatred coupled with the constant demand that "this daughter who should have been a boy was going to be as hard and self reliant as if she were indeed a boy" (p. 35). Both mother and daughter "become almost like men themselves—tough, unyielding, masculine in their thinking" (p. 35). Thus, Nym learned that her mother was a sexual variant, a Lesbian, and thus "Nym, too, to all intents and purposes became a boy" (p. 36).[13]

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[13] Lesbianism is a fact of life, well known to the scientist as well as the novelist. The case studies of Dr. George W. Henry, *Sex Variants: A Study of Homosexual Patterns* (N. Y. 1941) reveal inconstant patterns of subjective parental attitudes and overt conduct which lead to the development of sexual variances in the children. Caprio states in his treatise, *Variations in Sexual Behavior*, that "female homosexuality is as old as the human race. It constitutes a problem of universal significance. It has existed in every period of civilization, among every people." (p. 163). See also, Kinsey,

To enable her to rise from the squalor of her surroundings, Nym marries a hated man for his money. Then commences a struggle for success, made bitter by her inner frustrations and tendencies. Impelled by her Lesbian emotions, she seduces a young woman secretary, but regrets "bitterly what she had done to the young girl" (p. 40), whose personality she had twisted, and regrets "even more what she had done to herself" (p. 40). Through her husband, she grasps the opportunity "to organize her life in such a way that, meeting men on their own level, she could gradually work her hatred, her vindictiveness, her fierce sense of competition with them into a culmination of the type which she devoutly wished for" (p. 72). Through every artifice and guile (pp. 126, 157, 169, 176) she strives, in a life of loneliness and misery, to achieve "her final triumph over the world of men" (p. 126). In the moment of her seeming triumphant revenge, she meets death at the hands of a man whose affection she had used solely to gain her ends.[14]

A.C., *Sexual Behavior in the Human Female* (Phil. 1953); Freud, Sigmund, *Psychoanalysis of a case of female homosexuality* in 1 Int. J. Psychan. 125 (1920); Ellis, Havelock, *Studies in the Psychology of Sex* (1940); Stekel, W., *Bi-Sexual Love* (1933); Block, L., *Anthropological Studies in the Strange Sexual Practices of all Races in All Ages* (N. Y. 1933); Hirschfeld, M., *Sexual Pathology* (1932); Krafft-Ebing, R. von, *Psychopathia sexualis* (N. Y. 1935).

[14]See, Foster, J. H., *Sex Variant Women in Literature, A Historical and Quantitative Survey* (N. Y. 1956). The author lists in a bibliography (pp. 362-395), the titles of 324 literary work involving sexually variant women; 218 bibliographic, biographical, historical and critical material; 304 scientific and psychiatric material. The author concludes: "We have seen that feminine variance has persisted in human experience since the beginning of literary records. It has repeatedly aroused sufficient interest to be the subject of literature, some of it good enough to have survived through many centuries against all odds. The odds have been of two very different sorts—religious taboo and masculine distaste . . . . Momentarily, however, we have attained—or at least it

The holding of the courts below that the book herein should be suppressed is clearly a substantial interference with the communication of ideas and totally inconsistent with the free speech and due process provisions of the First and Fourteenth Amendments. The ordinance here has been construed and applied as extending to written material far beyond the limited area of "hard-core pornography" to which *Alberts* and *Roth* were presumably restricted.[15] The ordinance as thus construed and applied to the communication of ideas in literature, creates such vague, ambiguous and indefinite standards as to permit the abridgments of freedom of speech and press, and the censorial proscription of thoughts, beliefs, ideas and opinions expressed in works of art and literature. The ordinance as construed is totally inconsistent with the letter and spirit of the decision of this Court in *Roth-Alberts*, and clearly violative of the constitutional mandate. (See also, *One, Inc. v. Olesen*, 355 U. S. 371; *Sunshine Book Co. v. Summerfield*, 355 U. S. 372; *Times Film Corp. v. City of Chicago*, 355 U. S. 35.)[16]

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seems to us that we have attained—to somewhat more tolerance than the elder moralists. If variance is to be always with us, calm acceptance of that fact may become as prevalent as the recognition of human evolution has come to be. And since variant literary expression appears equally persistent, it may conceivably become a narrow but similarly recognized field, permitted to come to fruition according to its own laws, and to contribute the best of which it is capable, to the total sum of world literature" (pp. 353-354).

In a preface to the aforesaid treatise, Dr. George W. Henry states: "Sexual romance shows itself in so many different ways that all types of imaginative writings have to be studied if we are to understand human motivations and behavior."

[15]354 U. S. 476, 487, 495, 502, 505, 507-508. See, Brief for the United States in the Supreme Court, *Roth v. United States*, No. 582, Oct. Term, 1956, pp. 29, 37-39.

[16]"Where the First Amendment applies, it is a denial of all governmental power in our Federal System" *Marsh v. Alabama*, 326 U. S. 501, 511.

What the courts below appear to have overlooked is that freedom for a book seller to have a book in his establishment must be determined by the broad fundamental nature of freedom of speech and press in our democratic system; not by the character of the limitations placed on the exercise of that right. "What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another . . . From the multitude of competing offerings the public will pick and choose." (*Hannegan v. Esquire, Inc.*, 327 U. S. 146, 157-158.)

"The view that sexual variance in persons is not necessarily inherited, but rather the outgrowth of mistaken social attitudes on the part of parents, or of an unwholesome home life; that sexual variants suffer subjectively with ambivalent feelings of remorse and exultation; that they find difficulty in coping with their external lives; that a person so constituted can obtain little by merely carrying on a personal struggle against society, are ideas of social importance. Literature is closely concerned with psychological problems and the realistic portrayal of sex. It is concerned with life as it is, not with life as it ought to be. If we are to understand ourselves, let alone others, there should be no proscription on the portrayals of life in all its varying aspects. The fundamental value in the free communication of ideas is to help all the people "gain new maturity and understanding; otherwise our civilization will stagnate and die." (*Sweezy v. New Hampshire*, 354 U. S. 234, 250.)

Conclusion.

It is submitted that the case herein, in the light of the aforesaid, presents substantial federal questions which this Court should decide. The possible removal of all *scienter* requirements from prosecutions for "obscenity," if the decision here is upheld, will seriously affect the exercise of freedoms of speech and press in the entire nation. In essential aspects the constitutional standards enumerated by this Court in *Roth-Alberts* appear to have been ignored or misconstrued by the courts below, with resultant deprivation of fundamental rights. The importance of a correct application of this Court's constitutional interpretation of federal and state obscenity laws in *Roth-Alberts* looms large in the protection of property and liberty, and the due administration of justice, in all jurisdictions. Moreover, a precedent for a broad intrusion into the area of writings, both literary and scientific, will be created if the decision adverse to the book herein is permitted to stand.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Appellant.

SAM ROSENWEIN and
BROCK, FLEISHMAN & RYKOFF,
Of Counsel.

APPENDIX "A."

Opinion of the Appellate Department of the Superior Court, County of Los Angeles, State of California.

In the Appellate Department of the Superior Court, County of Los Angeles, State of California.

People of the State of California, Plaintiff and Respondent, vs. Eleazar Smith, Defendant and Appellant. Superior Court No. CR A 3792, Trial Court No. 57898.

Filed June 23, 1958.

Appeal by defendant from a judgment of the Municipal Court of the Los Angeles Judicial District, James H. Pope, Judge. Affirmed.

For Appellant—Brock, Easton, Fleishman & Rykoff.

For Respondent—Roger Arnebergh, City Attorney; Philip E. Grey, Assistant City Attorney; William E. Doran, Deputy City Attorney.

The defendant Smith appeals from a judgment based upon his conviction under Los Angeles Municipal Code, (Ordinance No. 77,000 as amended) pursuant to the complaint which charged that he violated paragraph 2 of section 41.01.1 thereof, in that he "did wilfully and unlawfully . . . . have in his possession an obscene and indecent writing, book, pamphlet, picture, photograph and drawing, to wit: Sweeter Than Life, in a place of business where magazines, books, pamphlets, papers and pictures were sold and kept for sale."

The ordinance provisions in question read in part as follows: "Sec. 41.01.1 Indecent Writings, Etc.—Possession Prohibited:

"It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet,

picture, photograph, drawing, . . . in any of the following places:

"1. In any school, school-grounds, public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;

"2. In any place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;

"3. In any toilet or restroom open to the public;

"4. In any pool room or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public; . . ."

Appellant's contentions cannot be sustained:

(1) The ordinance does not violate the First Amendment of the United States Constitution. Under the California Penal Code sec. 311 dealing with obscenity, the United States Supreme Court has held that "obscenity is not within the area of constitutionally protected speech or press." (Alberts v. California, Roth v. United States (1957), 354 U. S. 476 at 485, 77 S. Ct. 1304, 1 L. ed. 2d 1498).

(2) The characterization as "obscene" is not too indefinite to constitute a valid standard. In the case last cited, the trial judge applied the test laid down in People v. Wepplo (1947), 78 Cal. App. 2d Supp. 959, 178 Pac. 2d 853, which was approved by the U. S. Supreme Court in the Alberts case (354 U. S. at 489).

(3) Under any test, the book concerned in this prosecution was properly held to be obscene by the trial court, and we share such a conclusion upon our independent view of the evidence, if that be necessary in view of the as-

sertion of constitutional right, though such a right is clearly non-existent. (Alberts v. California (1957), 354 U. S. 476, 485-486, 1 L. ed. 2d 1498, 77 S. Ct. 1304). Obscenity is not constitutionally protected. The "community standard" is, as in other criminal matters, to be determined by the trier of the fact. (Parmelee v. United States (1940), 113 F. 2d 729, 741).

The police power of the state in such matters is not restrained by the definitions applied by the federal courts to the federal question of admission of books to the country or to the mails. A national common-denominator of morality may be considerably less than that in a state, which has the right to set, and to adhere to, its own standards in such matters. (U. S. Const., Amdt. X). That any obscene book or picture may be popular is no ground for holding that it may not be suppressed, since that condition may be exactly the occasion for legislative action against it to protect the public morals. Such legislation preeminently falls within state police power. (Lawton v. Steele (1893), 152 U. S. 133, 14 S. Ct. 499, 38 L. ed. 385).

We reach this conclusion, also, when we have considered the book as a whole, under tests that the appellant contends are applicable. There are obvious common sense limits to the "over all" view. We are not persuaded that a bawdy house is any the less a brothel, because many of the rooms of the house may be occupied with dining and dancing, in view of what goes on in the bedrooms. A book is not necessarily clean or not obscene because some of the chapters or paragraphs leading to the bedroom, couch, summerhouse or other available place themselves do not describe the details of adulterous fornication nor rape. (*Cf.* Besig v. United States (1953), 208 F. 2d 142, 146).

(4) The defendant offered expert witnesses to testify what psychological effect the prurient material in question would have on a normal average person. In California, this is no more the subject of expert testimony than what the conduct of a reasonable and prudent person would be in a negligence action. This is for the trier of the fact. (People v. Wepplo, *supra*, 78 Cal. App. 2d Supp. 959; *cf.* United States v. Kennerley (1913), 209 F. 119, 121). Nor was it error to exclude evidence as to the contents of other books, alleged to be no different or even more sexually titillating, on the theory that legislation is invalid which seeks to restrain that which is popular. Pornography has not been popular enough to induce the state and city legislators who represent the populace at large to change the legislative policies, or to redefine the common understanding of the meaning of well-established English words. The great quarrel in this field actually seems not to be with the definition of "obscenity" but with its application, to particular states of fact. We have no such difficulty in this case. We have found that the book in question is obscene, not merely that there is sufficient evidence to support the implied finding of the trial court to that effect, keeping in mind what we said in People v. Wepplo, *supra* (1947), 78 Cal. App. 2d Supp. 959, 961, in which obscenity was defined in construing Cal. Penal Code sec. 311(3).

(5) The Los Angeles city ordinance No. 77,000 (known as the Los Angeles Municipal Code) section 41.01.1, has the full force of a statute of the state within the limits of the city. (Odd Fellows Cemetery Assn. v. San Francisco (1903), 140 Cal. 226, 230, 73 Pac. 987; Boyd v. City of Sierra Madre (1919), 41 Cal. App. 520), except so far as it is "in conflict with general laws." (Cal. Const.

Art. XI sec. 11; Simpson v. City of Los Angeles (1953), 40 Cal. 2d 271, 278, 253 Pac. 2d 464, app. dis. 346 U. S. 802, 74 S. Ct. 37, 98 L. ed. 333, rehearing den. 346 U. S. 880, 74 S. Ct. 118, 98 L. ed. 387).

In California, this police power of cities is one of the oldest municipal powers. Cal. Const. (1879) Art. XI sec. 11, perpetuated the power that was granted in the earliest charters and general laws for organization of municipal corporations in California, repeated and applied many times before 1879. (For instance, Charter of Sacramento, Cal. Stats. 1850, p. 70 sec. 5; *idem*, San Diego, p. 122 sec. 5; *idem*, San Jose, p. 125, sec. 5; *idem*, for incorporation of towns, p. 128-129, sec. 6; *idem*, for incorporation of cities, p. 87-88, sec. 11). In the 1879 constitution, article XI related to local government, and the same section number, 11, was retained, as formerly pertained to this power in the Act for Incorporation of Cities. Before the Constitution of 1879, such power was conferred by the legislature. Now, it is conferred by the constitution itself. Prior to 1879, the numerous statutes and special charters gave full power to cities to pass ordinances "not repugnant . . . to the laws of this State." Prior to 1879, the laws applying to cities were sometimes general and often special, but in 1879 by Art. IV sec. 25, the legislature was forbidden to pass "local or special laws . . . Creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts."

Hence, Art. XI sec. 11 vested and vests power in cities to pass police regulations "*not in conflict with general laws.*" (emphasis added) Appellant asserts that there is such a conflict here between Penal Code sec. 311 and the ordinance in question.

Under the ordinance, it is illegal for a person to "have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, . . . of any kind in any of the following places: . . . 2. In any place of business where . . . school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale; . . ." (Municipal Code, sec. 41.01 I.)

Penal Code sec. 311 provides, so far as applicable: "Every person who wilfully and lewdly, either: . . . 3. Writes, . . . sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; . . . is guilty of a misdemeanor." Municipal Code sec. 41.01.I is more restrictive since it eliminates the requirement that a sale be made "lewdly" and, in making it illegal to possess such material in such a place of business, is irrespective of a lewd intent to sell it or to keep it for sale.

The city ordinance is more restrictive than the Penal Code sec. 311. Under the Penal Code section *scienter* is required. The defendant must possess the obscene material "wilfully and unlawfully" and with "lewd" intent. (People v. Wepple, *supra* (1947), 78 Cal. App. 2d Supp. 959, 178 Pac. 2d 853; Matter of Application of Ahart (1916), 172 Cal. 702, 159 Pac. 160.)

There is no conflict. Wilful possession of an obscene book in a bookstore is not made an offense under the Penal Code provision, but it is under the city ordinance. Defendant could not have been prosecuted under Penal Code sec. 311 for wilfully and unlawfully possessing the material in a bookstore without more. This fact alone, demonstrates that the municipal ordinance is not in conflict with the general law. A prosecution may be had under an ordinance and a statute (*cf.* People v. Burkhart (1936), 5 Cal. 2d 641, 55 Pac. 2d 846) where separate, distinct elements are involved in each. Local legislation

must be *in conflict* with general law, before the constitutional grant of the police power to local bodies is inoperative and that vested in the legislature is given priority. No permission from the legislature itself to a city is necessary to the exercise of the local power under the constitution. Legislative declarations of permission to legislate confer none, but only indicate that the legislature in its own opinion has not purported to completely cover the subject matter. This relates to statutory construction, and not to power.

In this case, the relation of the local to the state legislation is essentially the same as that in People v. Commons (1944), 64 Cal. App. 2d Supp. 925, where possession of any dangerous or deadly weapon in an automobile was held to be effective, though the state Dangerous Weapons Control Law was less restrictive; People v. Burkhart, *supra* (1936), 5 Cal. 2d 641, 55 Pac. 2d 846, where the ordinance prohibited being drunk in an auto on the highway, and the state statute prohibited driving an automobile while intoxicated. *In re* Iverson (1926), 199 Cal. 582, where the state law permitted a druggist to fill a prescription for 16 ounces of intoxicating liquor, reduced by the Los Angeles ordinance to 8 ounces, and in which the doctrine of "more restrictive legislation" is considered and approved; *In re* Hoffman (1909), 155 Cal. 114, 99 Pac. 517, holding valid increased standards for milk solids in milk; Sternall v. Strand (1946), 76 Cal. App. 2d 432, 434-435, 172 Pac. 2d 921; Roemer v. Municipal Court (1949), 90 Cal. App. 2d 854, 856-858; Markus v. Justice's Court (1953), 117 Cal. App. 2d 301, 306-307; Witt v. Klimm (1929), 97 Cal. App. 131, 134, 274 Pac. 1039, upholding additional regulation.

The same conclusion has been reached by the courts of other states which have adopted the provisions or principles

of Cal. Const. Art. XI sec. 11. (*cf.* Allen v. City of Bellingham (1917), 95 Wash. 12, 163 Pac. 18, 20, reviewing cases; City of Shreveport v. Provenza (1956), 231 La. 514, 91 So. 2d 777; Jones v. City of Chicago (1952), 348 Ill. App. 310, 108 N. E. 2d 802, 805, ordinance raising amounts of insurance to be carried by taxicab operators above amounts set by state statute, the rule being stated "An ordinance, because of local conditions, may impose more rigorous or definite regulations under a proper delegation of power in addition to those imposed by the State"; State *ex rel.* Sutton v. Caldwell (1940), 195 La. 507, 197 So. 214, 218, citing Mann v. Scott (1919), 180 Cal. 550, 182 Pac. 281; and *In re* Hoffman (1909), 155 Cal. 114, 99 Pac. 517, 132 Am. St. R. 75; City of Garden City v. Miller (1957), 181 Kan. 360, 311 Pac. 2d 306, 311; State v. Centanne (1956), 265 Ala. 35, 89 So. 2d 570, 571; Kansas City v. Henre (1915), 96 Kan. 794, 153 Pac. 548, 549, citing *In re* Hoffman, *supra*, 155 Cal. 114, 118).

Until one of our supreme courts declares otherwise, we are of the opinion that a book seller may be constitutionally prohibited from possessing or keeping an obscene book in his store and convicted of doing so even though it is not shown he knows its obscene character, nor that he intends its sale. He may not, with impunity, adopt as his rule of conduct: "Where ignorance is bliss, 'Tis folly to be wise.'"

Those who are engaged in selling articles of a particular class to the public, have the first and best opportunity to know or be on notice of their characteristics, even though possession and not sale is involved. (Civ. Code sec. 18, 19). Statutes commonly have forbidden the sale, offering for sale or possession of filthy articles, dangerous or deleterious to the public; or contrary to public morals; or

otherwise unlawful; and have placed the duty to know their characteristics upon the possessor. (*Cf.* People v. Schwartz (1937), 28 Cal. App. 2d Supp. 775, 70 Pac. 2d 1017; Escola v. Coca Cola Bottling Co. (1944), 24 Cal. 2d 453, 463; United States v. Dotterweich (1943), 320 U. S. 277, 88 L. ed. 49, 64 S. Ct. 134; note 152 A. L. R. 765). The abatement of property used for an unlawful purpose does not depend on the knowledge of the owner. (People v. McCaddon (1920), 48 Cal. App. 790, 192 Pac. 325). So with books.

It is a matter of common knowledge that booksellers have possessed obscene books, kept in the back room or the locked case at their places of business. While not displayed for sale, the possession on the premises is validly considered as tending toward exhibition and sale, and hence possession is validly established as a separate offense, without showing of a lewd intent, as provided in Penal Code sec. 311. "Possession" frequently is prohibited without more, in penal statutes. Consult: fish and game, note 125 A. L. R. 1200; unlawful possession of cane gun or bird net, Cal. Fish & Game Code secs. 2008-2009; *idem*, secs. 8800-8807, beach nets; salmon, *idem*, secs. 8212, 8215; narcotics and drugs in prison, Penal Code sec. 4573.6; firearms, Penal Code sec. 4574; counterfeit coin, Penal Code sec. 479; deadly weapons, Stat. 1923, p. 696, sec. 2 as amended; machine guns, Deering's Gen. Laws Act 1971, Stat. 1927, p. 938, as amended).

The judgment is affirmed.

Dated June 23, 1958.

DAVID *J.*

I concur:

BISHOP *P. J.*

I dissent.

The legislature by Penal Code sec. 311(3) has occupied the field of selling and keeping for sale an obscene or indecent book. Therefore, under Article XI, sec. 11 of the Const. of California, that portion of sec. 41.01.1 of the Los Angeles Municipal Code (Ord. No. 77,000) is void which attempts to make it a misdemeanor for a person to have in his possession an obscene and indecent book in a place of business where books etc. are sold or kept for sale. The evidence is undisputed that Smith was the proprietor of a book store in the City of Los Angeles and that he sold and kept for sale the books in question at his store.

The evidence proves a violation of the state law as well as a violation of the ordinance. The problem thus posed is by no means merely academic. A defendant is not guilty of violating Penal Code sec. 311 unless he had knowledge of the character of the material. People v. Wepplo, *supra* (1947), 78 Cal. App. 2d Supp. 959, 964. To the word "knowledge" we would add "or notice", meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials. To appear profound, we refer to this knowledge or notice as "scienter". Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does. This is true because the city ordinance uses the words "wilfully and unlawfully", whereas Penal Code sec. 311 uses the words "*wilfully and lewdly*". This interpretation and distinction is pointed out in People v. Wepplo, *supra* (1947), 78 Cal. App. 2d Supp. 959, 963, *et seq.* The state law has occupied the field of selling and keeping for sale an obscene writing, paper or book. To sell it and keep it for

sale, the defendant had the book in his possession at his store. The city cannot deprive him of the defense of "no scienter" by charging him with possession under the ordinance, People v. Commons, *supra* (1944), 64 Cal. App. 2d Supp. 925; People v. Webb (1958), 158 A. C. A. 622; the complaint did not state any violation of Penal Code sec. 311 for it failed to charge that the defendant sold or offered for sale the book and magazine *lewdly*. *In re* Correa (1918), 36 Cal. App. 512, 513.

It is true as stated in the majority opinion that "there is no declaration by the legislature that it purports to cover the field." Such a declaration is not indispensable. The law as to occupation of the field by the state is well stated in 28 Ops. Atty. Gen. 192 as follows:

"Where the State statute expressly sets forth an intention to completely occupy the whole field of regulation of the subject matter and actually implements such intention by providing for such regulation, local regulation of the same subject matter is prohibited (Pipoly v. Benson, 20 Cal. 2d 366, 370). On the other hand, the State statute may expressly provide that local regulations may supplement the general law. In such cases reasonable local ordinances imposing supplementary requirements may be enacted (National Milk Producers Ass'n. v. City and County of San Francisco, 20 Cal. 2d 101, 110-111; *In re* Iverson, 199 Cal. 582, 586-588).

"If the State statute contains no outright declaration of intention with respect to local regulation, the determination of the question whether the Legislature has undertaken to occupy exclusively a given field of legislation depends upon an analysis of the statute and a consideration of the facts and circumstances upon which it was intended to operate' (*Tolman v. Underhill*, 39 Cal. 2d 708, 712)."

The question in Tolman v. Underhill, *supra*, was whether the Regents of the University of California could require from faculty members a more restrictive oath than that required by the State law in Government Code secs. 3100-3109. The court held they could not.

In Bowen v. County of Los Angeles (1952), 39 Cal. 2d 714, the court held that the state had occupied the same field to the exclusion of an oath required by order of the Board of Supervisors.

It is obvious from a reading of Penal Code sec. 311(3) and the use of "lewdly" therein that the legislature intended to give all proprietors of book stores throughout the State protection of the scienter rule. This is a wise and just provision because those proprietors customarily buy books from advertisements sent out by the publishers. Such dealers order books without an opportunity to read them in advance. I would reverse the judgment.

SWAIN
Judge

APPENDIX "B."

Judgment.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Eleazar Smith, Defendant and Appellant. Superior Court No. CR A 3792, Trial Court No. 57898.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California:

Filed June 23, 1958.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

APPENDIX "C."

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The provisions of §41.01.1 of the Municipal Code of the City of Los Angeles are:

> "INDECENT WRITING, ETC.—POSSESSION PROHIBITED.
>
> "It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places:
>
> 1. In any school, school-ground, public park or playground or in any public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;
>
> 2. In any place of business where ice-cream, soft drinks, candy, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;

3. In any toilet or restroom open to the public;

4. In any poolroom or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public;

5. In any place where phonograph records, photographs, motion pictures, or transcriptions of any kind are made, used, maintained, sold or exhibited."

4. The provisions of California Penal Code §311, subdivision (3) are:

"Every person who wilfully and lewdly, either: . . ."

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or. . . ."

". . . . is guilty of a misdemeanor."

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 429

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND OR DISMISS THIS APPEAL.

ROGER ARNEBERGH,
City Attorney,
PHILIP E. GREY,
Assistant City Attorney,
WILLIAM E. DORAN,
Deputy City Attorney,
By PHILIP E. GREY,
40-P City Hall,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Statement 2

Argument 3

I.

There is no constitutional requirement that knowledge of the obscene character of the book be an element of the offense 3

II.

The rejection of appellant's purported expert witnesses did not deprive appellant of any constitutional protection 7

III.

The Appellate Department of the Superior Court used the accepted California test for obscenity 9

IV.

Appellant has suffered no violation of his constitutional guarantees of freedom of speech and press 10

V.

Conclusion 10

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498	8, 10
Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 31 S. Ct. 612, 55 L. Ed. 582	5
Lambert v. California, 355 U. S. 225, 2 L. Ed. 2d 228	6
People v. Daniels, 118 Cal. App. 2d 340	3
People v. Grana, 1 Cal. 2d 565	9
People v. Lindsey, 90 Cal. App. 2d 558	9
People v. McClennegan, 195 Cal. 445	4
People v. Wepplo, 78 Cal. App. 2d (Supp.) 959	3, 7, 9
Roth v. United States, Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498	8, 9, 10
United States v. Balint, 258 U. S. 250, 42 S. Ct. 301, 66 L. Ed. 604	4, 6

RULES

Revised Rules of the United States Supreme Court, Rule 16	1

STATUTES

Los Angeles Municipal Code, Sec. 41.01.1, par. 2	2
United States Constitution, First Amendment	10

IN THE

Supreme Court of the United States

October Term, 1958.

No. 519

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered June 23, 1958, be affirmed, and/or that the appeal taken therefrom to this Court be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgment appealed from rests upon an adequate nonfederal basis.

Statement.

This is a direct appeal from a judgment entered June 23, 1958, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District, with having committed various violations of paragraph 2 of Section 41.01.1 of the Los Angeles Municipal Code. It was alleged that appellant "did wilfully and unlawfully . . . have in his possession an obscene and indecent writing, book, pamphlet, picture, photograph and drawing, to wit, *Sweeter Than Life*, in a place of business where magazines, books, pamphlets, papers and pictures were sold and kept for sale."

The case was tried by the court without a jury and appellant found guilty of such charge. An appeal was duly taken to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matter was submitted and thereafter the judgment was affirmed. (Jurisdictional Statement, Appendix "A", pp. 1-13, and 161 A. C. A. Supp. 896, 327 P. 2d 636.) A petition for rehearing was filed and denied. A notice of appeal to this Court was thereafter presented.

ARGUMENT.

I.

There Is No Constitutional Requirement That Knowledge of the Obscene Character of the Book Be an Element of the Offense.

As stated by the Appellate Department of the Superior Court in the opinion in this case, a book seller may be constitutionally prohibited from possessing an obscene book in his store though it is not shown that he knows its obscene character or intends its sale. This follows the rule as stated in *People v. Wepplo*, 78 Cal. App. 2d (Supp.) 959, 964:

> "No doubt the legislature could, on the reasoning which justifies the pure food and other similar laws, adopt a statute prohibiting the sale of obscene books regardless of the knowledge of their character or without any specific intent.
>
> "It is the universal rule that it is within the power of the legislature to declare an act criminal, irrespective of the knowledge of the doer that the facts exist which make the act unlawful. (*People v. McClennegan*, 195 Cal. 445, 468; 22 C. J. S. 85, sec. 30; 14 Am. Jur. 768, sec. 16.)
>
> "Whether knowledge of the facts is a necessary element of a statutory offense is a matter of construction to be determined by considering the subject matter of the statute, its language, the evil sought to be eradicated, its manifest purpose and design, and the consequences of the several constructions to which the statute may be susceptible."

People v. Daniels, 118 Cal. App. 2d 340, 343.

"In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute."

People v. McClennegan, supra.

"While the general rule at common law was that scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes, even where the statutory definition did not in terms include it, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.

"It is a question of legislative intent, to be construed by the court. It has been objected that punishment of a person for an act in violation of law, when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in *Sherlin Carpenter Co. v. Minnesota*, 218 U. S. 57, 69, 70, 54 L. ed. 930, 935, 936, 30 Sup. Ct. Rep. 663, in which it was held that in the prohibition or punishment of particular acts, the state may, in the maintenance of a public policy, provide 'that he who shall do them, shall do them at his peril, and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes . . . ."

United States v. Balint, 258 U. S. 250, 42 Sup. Ct. Rep. 301, 66 L. ed. 604.

"The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot we think, be questioned. . . .

"As there is an undoubted competency in the lawmaker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature and to enforce the law in absolute conformity with the legislature. . . .

"Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owners and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted: for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril."

Chicago B. & Q. R. Co. v. United States, 220 U. S. 559, 31 S. Ct. 612, 55 L. ed. 582.

The case of *Lambert v. California*, 355 U. S. 225, 2 L. ed. 2d 228, was decided on an entirely different type of factual situation. But, as stated in the prevailing opinion;

> "We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, 4 Bl. Comm. 21, for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude on the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definitions. See *Chicago B. & Q. R. Co. v. United States*, 220 U. S. 559, 578, 55 L. ed. 582, 589, 31 S. Ct. 612. But we deal here with conduct that is *wholly passive*—mere failure to register. It is unlike the commission of acts, or the failure to act *under circumstances that should alert the doer to the consequences of his deed.*" (Emphasis added; citing cases, including *United States v. Balint, supra.*)

While it is indicated that appellant had no reason to believe the book contained any objectionable material (Jurisdictional Statement, p. 9), the witness, William A. Rothweiler, appellant's clerk in the store where the book in question was purchased, testified:

> "A. We have a sign up there. Mr. Smith told me about it. He said 'Don't let anyone handle any books or art magazines unless they are 21 years of age.' We have a big sign up in the store.
>
> Q. What are these books and magazines you don't want these juveniles to handle? A. Well, the books which we are discussing, the one book they picked up, like *Sweeter Than Life*.
>
> Q. You wouldn't want any juveniles handling that book? A. Well, they are not . . . I don't know. That is just what I have been told.
>
> Q. Who told you? A. Mr. Smith told me." [Clk. Tr. p. 363, original Rep. Tr. p. 269.]

II.

The Rejection of Appellant's Purported Expert Witnesses Did Not Deprive Appellant of Any Constitutional Protection.

The rejection of the testimony of purported expert witnesses by the trial court was approved by the Appellate Department of the Superior Court in this case, under the California rule of *People v. Wepplo*, 78 Cal. App. 2d (Supp.) 959, 178 P. 2d 853, in which case the court stated:

> "If the book sold by defendants was in fact obscene, judged by its contents, it would not become any less so because other book dealers were selling it, or that the public library had copies of it, or literary critics praised it as a work of literary merit, or because other books equally bad were being openly sold. (See *Commonwealth v. Isenstadt*, supra, at pp. 846, 848, 849 of 62 N. E. 2d for discussion of some of these matters.) The fact that a book has literary merit does not prevent it from being obscene, if otherwise it has that character. (*Halsey v. New York Soc. for Suppression of Vice* (1922), 234 N. Y. 1 (136 N. E. 219); *Commonwealth v. Buckley* (1909), 200 Mass. 346 (86 N. E. 910), 128 Am. St. Rep. 425, 22 L. R. A. N. S. 225.) It does not appear that the critics whose opinions were offered discussed the question of obscenity, but if they had done so it would have been proper to exclude the opinions because this was the very issue to be decided by the jury. (32 C. J. S. 74; *Gardenswartz v. Equitable, etc. Soc.* (1937), 23 Cal. App. 2d 745, 753 (68 P. 2d 322); *People v. Crossan* (1927), 87 Cal. App. 5, 16 (261 P. 531).)"

This question was discussed by Mr. Justice Harlan in his separate opinion, concurring with the prevailing opinion affirming the judgment of the Appellate Department of the Superior Court in *Alberts v. California:*

> "The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce to a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. In fact the very division of opinion on the subject counsels us to respect the choice made by the State."

Roth v. United States;

Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. ed. 2d 1498.

III.

The Appellate Department of the Superior Court Used the Accepted California Test for Obscenity.

The opinion of the Appellate Department in this case stated:

> "We have found that the book in question is obscene, not merely that there is sufficient evidence to support the trial court to that effect, keeping in mind what we said in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 961, in which obscenity was defined in construing Cal. Penal Code sec. 311(3)." (Jurisdictional Statement, Appendix "A", p. 4.)

This Court, in *Roth v. United States, Alberts v. California* (354 U. S. 476, 77 S. Ct. 1304, 1 L. ed. 2d 1498) has accepted the California test of *People v. Wepplo, supra.*

There is nothing in the opinion of the Appellate Department of the Superior Court to indicate that the trial court used any but the California test of obscenity, and any remarks of the trial court, cited by appellant, had no affect on the validity of its judgment under California law, in that:

> "The remarks of a trial judge made in the course of deciding a case whether written or oral are of no concern on appeal. He might repeatedly announce contrary observations in his discussion, but that which spells triumph or defeat is the content of the judgment entered. The appeal is based on the record which excludes all comments of the court made in deriving its conclusion."
>
> *People v. Lindsey*, 90 Cal. App. 2d 558, 564, citing *People v. Grana*, 1 Cal. 2d 565.

IV.

Appellant Has Suffered No Violation of His Constitutional Guarantees of Freedom of Speech and Press.

Appellant was convicted under an ordinance aimed only at material obscene in character.

In *Roth v. United States, Alberts v. California, supra,* this Court accepted the California test for obscenity and held that obscenity is not within the area of constitutionally protected speech or press, and that implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

V.

Conclusion.

The Appellate Department of the Superior Court has decided the question of intent, testimony of expert witnesses, and the meaning of obscenity on adequate state grounds. The finding of the trial court, and the specific finding of the Appellate Department of the Superior Court that the book *Sweeter Than Life* is obscene, indicates that such book is not within the area of constitutionally protected speech or press.

Appellee urges, therefore, that appellant presents no substantial question for the decision of this Court: that the judgment sought to be appealed from should be affirmed and or the appeal dismissed.

Respectfully submitted.

ROGER ARNEBERGH,
City Attorney,
PHILIP E. GREY,
Assistant City Attorney,
WILLIAM E. DORAN,
Deputy City Attorney,
By PHILIP E. GREY,
Attorneys for Appellee.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 9

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Appellant's Brief in Opposition to Motion to Dismiss and/or Affirm.

STANLEY FLEISHMAN,
1741 Ivar Avenue,
Hollywood 28, California,
Attorney for Appellant.

SAM ROSENWEIN and
BROCK, FLEISHMAN & RYKOFF,
Of Counsel.

SUBJECT INDEX

	PAGE
Statement	1
Conclusion	10

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Alberts v. California, 354 U. S. 476	6, 7, 9
Butler v. Michigan, 352 U. S. 380	8
Chicago, Burlington & Quincy Railway Co. v. United States, 220 U. S. 559	4
Davis v. Wechsler, 263 U. S. 22	8
Drivers Union v. Meadowmoor Co., 312 U. S. 287	8
Home Insurance Co. v. Dick, 281 U. S. 397	2
Kingsley International Pictures Corp. v. Regents, 4 N. Y. 2d 349, 175 N. Y. S. 2d 39	9
Lambert v. California, 355 U. S. 225	5
Morissette v. United States, 342 U. S. 246	3, 4
Mugler v. Kansas, 123 U. S. 623	6
One, Inc. v. Olesen, 355 U. S. 371	10
People v. Daniels, 118 Cal. App. 2d 340, 257 P. 2d 1038	3, 4
People v. McClennigan, 195 Cal. 445, 234 Pac. 91	4
People v. Wepplo, 78 Cal. App. 2d (Supp.) 959, 178 P. 2d 853	3, 6, 8
Sunshine Book Co. v. Summerfield, 355 U. S. 372	10
Tevis v. Beigel, 156 Cal. App. 2d 8, 319 P. 2d 98	8
Times Film Corp. v. City of Chicago, 355 U. S. 35	10
United States v. Balint, 258 U. S. 250	4
Wieman v. Updegraff, 344 U. S. 183	4

STATUTES

United States Code, Title 28, Sec. 1257(2)	2
United States Constitution, First Amendment	3, 4, 5
United States Constitution, Fourteenth Amendment	3, 4, 5

IN THE

Supreme Court of the United States

October Term, 1958.

No. 519

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Appellant's Brief in Opposition to Motion to Dismiss and/or Affirm.

Statement.

Appellee's motion to affirm the judgment and/or dismiss the appeal is virtually devoid of argument. Two conclusions are stated in support of the motion: the first, that the judgment rests upon an "adequate nonfederal basis"; the second, that the "federal question is so unsubstantial as not to warrant further argument" [M., p. 1].[1]

As to the first conclusion—that the judgment rests upon an adequate nonfederal basis—the appellee's motion is silent in support thereof. There is plainly no merit

[1] The reference "M" is to appellee's motion to dismiss and/or affirm.

to the contention. The appellee does not deny that the federal questions were seasonably presented; that the federal questions were constantly raised throughout the proceedings; that the court below assumed that the federal questions were properly before it, and considered and disposed of the issues [J., pp. 3-4, 11-12].[2] *Home Insurance Co. v. Dick*, 281 U. S. 397, 407. What appellee seems to be asserting [M., p. 10] is that if the federal questions were correctly decided below, the judgment should not be disturbed. That is not a jurisdictional argument, but an ultimate argument on the merits. 28 U. S. C., Sec. 1257(2).

As to the claim that the federal questions presented are not substantial, appellee again omits argument in support of its position. The operation and effect of the ordinance herein, on its face and as construed and applied, upon the exercise of freedoms of speech and of the press has been totally ignored by appellee. We discuss briefly below the points made by appellee in its motion, in the order there presented.

1. Appellee asserts that there is no constitutional inhibition against the punishment by fine and imprisonment of the innocent possessor of an alleged obscene book in an establishment where books are kept for sale, even if there is no knowledge of the contents or of the objectionable character of the book, and no intent to sell it.

Appellant in his Jurisdictional Statement [pp. 13-19] argues that the ordinance which authorizes such punishment places arbitrary and impossible burdens upon the exercise of the freedoms of speech and press in contra-

[2] The reference "J." is to appellant's Jurisdictional Statement.

vention of the First and Fourteenth Amendments; that the lumping of the innocent and guilty alike under this ordinance is a sheer assertion of arbitrary power [J., pp. 21-22]; and that it is arbitrary and capricious to deprive the appellant of the benefit of a *scienter* rule which California has always afforded to the proprietors of book stores throughout the state [J., pp. 25-26].

Appellee does not meet these issues in its motion nor does appellee deny that the federal questions presented are substantial.

Appellee's only position seems to be that the power of the municipality to impose absolute criminal liability upon innocent persons is unfettered; that knowledge and intent may be eliminated as ingredients of the offense in any case. Appellee apparently sees no difference between a case involving books and a case involving machine guns. *People v. Daniels*, 118 Cal. App. 2d 340, 257 P. 2d 1038 [M., p. 3]. Whether the "police power" is so limitless under the Constitution is a grave question which this Court alone can answer, it is respectfully submitted [J., pp. 19-26]. See, *Morissette v. United States*, 342 U. S. 246, 260.

The cases cited by appellee do not meet the issue here, nor support its broad assertion of uninhibited power. The quotation from *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853 [M., p. 3] is, of course, dicta, since that case specifically held that the California statute required proof of a lewd intent, and held that such requirement had been the policy of the State since the enactment of the Penal Code in 1872 (*supra*, at p. 964). Moreover, the *Wepplo* dicta is from the same Appellate Department whose divided opinion below is now the subject of this review.

People v. Daniels, 118 Cal. App. 2d 340, 257 P. 2d 1038 [M., p. 3] involved the California Machine Gun Law, as applied to an ex-convict, on parole after a conviction of robbery, who claimed that he did not know that the weapon in his possession was a machine gun. Both the majority and concurring opinions emphasized that under other circumstances, punishment for innocent possession would "pass the bounds of reason" (p. 344), would "flout reason and justice" (p. 345).

People v. McClennigan, 195 Cal. 445, 234 Pac. 91 [M., pp. 3-4] was a prosecution for violation of the state criminal syndicalism law. The court held that it was unnecessary to determine whether knowledge of the unlawful purposes of the organization at the time of joining was an essential ingredient of the offense (p. 468), and held further that the accused could show that he "was ignorant of its purposes" (p. 471). *Cf., Wieman v. Updegraff*, 344 U. S. 183.

United States v. Balint, 258 U. S. 250 [M., p. 4] involved the sale of opium, not the innocent possession of a book ordinarily protected from government interdiction under the First and Fourteenth Amendments. The case was cogently criticized and limited by the trenchant opinion of Mr. Justice Jackson, writing for this Court, in *Morissette v. United States*, 342 U. S. 246, 258-260. See, Jurisdictional Statement, p. 22, n. 7.

Chicago, Burlington & Quincy Railway Co. v. United States, 220 U. S. 559 was a civil action brought to recover penalties for violations of the Safety Appliance Acts. The case involved the duty of placing automatic couplers on trains moving in interstate traffic. The Court emphasized that the burdens had been placed "upon those

who could measurably control their causes, instead of those who are in the main helpless in that regard" (p. 575). It is submitted that such a situation is constitutionally different from a situation involving the innocent proprietor of a bookshop who is *imprisoned* for the mere possession of an alleged obscene book which he did not intend to sell.

Appellee attempts to distinguish *Lambert v. California*, 355 U. S. 225 by asserting that it "was decided on an entirely different type of factual situation" [M., p. 6]. But *Lambert* undermines appellee's argument here. Appellee's sole argument here is that the police power, with respect to dispensing with the requirements of knowledge and intent, is limitless. Appellee has refused to acknowledge that the free speech and free press provisions of the First and Fourteenth Amendments place limits upon the exercise of the police power [J., p. 19], and this Court held in *Lambert* that "due process places some limits on its exercise" (p. 228). The substantial question presented here is whether this particular ordinance, in view of the subject matter and the nature of the offense, does not in fact do violence to the aforesaid substantive and procedural requirements of the due process and equal protection provisions of the Fourteenth Amendment.[3]

---

[3]Appellee attempts now to impute some knowledge to appellant by a quotation from the record involving the testimony of appellant's clerk [M., p. 6]. But the entire testimony of the clerk [C. T. pp. 302-305] made it clear that as a matter of business policy, appellant had directed that no one under 21 years of age was to be permitted to handle any magazine or book in the store. To infer knowledge of the contents or the character of any particular book from such circumstances would be clearly unreasonable. In any event, the court below disposed of this issue by holding that under the ordinance knowledge and intent were not ingredients of the offense; nor matters of defense (App. A, pp. 6-9).

Since appellee asserts only an absolute power to remove all *scienter* requirements from any statute, it has made no attempt to meet appellant's argument that the ordinance here, in operation and effect, deprives appellant of his liberty and property arbitrarily and capriciously, without due process of law [J., pp. 19-26]. But this Court has held:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."
>
> *Mugler v. Kansas*, 123 U. S. 623, 661.

2. The appellant urges that the ordinance has been unconstitutionally construed and applied so as to deprive him of any opportunity *to prove* that the book involved does not in fact, taken as a whole, applying contemporary community standards, appeal to the prurient interest of the average person, nor have a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires [J., pp. 27-32]. Appellee asserts, without argument, that the rejection of such evidence did not deprive appellant "of any constitutional protection" [M., p. 7], relying solely on a quotation from the opinion in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, and an excerpt from the opinion of Mr. Justice Harlan in *Alberts v. California*, 354 U. S. 476.

The *Wepplo* decision was rendered ten years before the decision of this Court in *Alberts*. This Court has decided that a book is not "obscene" unless, among other things, the book goes substantially beyond customary limits of candor in description or representation. This is a new

element added by this Court, and clearly designed to afford an accused opportunity to show that the book, in theme and description, does not go beyond accepted community standards.

If an accused cannot show that the particular book, and other comparable books, were being widely sold and candidly read, that the "public library had copies," that literary critics "praised it as a work of literary merit," then an accused is being deprived of the opportunity to prove that the book is not "obscene," or, in other words, that the accused is innocent.

Clearly, the constitutional issue thus presented here is one of substance. Appellant does not understand the quotation from Mr. Justice Harlan's opinion to mitigate the importance of the question. Mr. Justice Harlan was discussing the constitutional validity of the state statute on its face, and held that *the legislature* could reasonably conclude that there was some causal connection between the reading of pornography and sexual misconduct. There is nothing, however, in the quoted excerpt to support the view that *in a judicial forum* the accused could be deprived of opportunity to prove that a particular book, in fact, was not "obscene" or did not "appeal to prurient interest" or did not "corrupt and deprave" its readers.

3. Appellant urges that the courts below used unconstitutionally restrictive standards in determining the alleged "obscenity" of the book here involved, and ignored the proper standards enunciated by this Court in *Alberts* [J., pp. 32-36].

Appellee does not attempt to defend the position of the trial court, but argues that a state rule of practice requires this Court to disregard the reasoning of the trial court.

Appellee asserts that the opinion of the Appellate Department indicates that the *Wepplo* test for obscenity was mentioned, and assumes that such mention is sufficient to dispose of the matter without regard to the action of the trial court [M., p. 9].

The difficulty with appellee's position is that the rule of practice to which it refers has for some time been abandoned in California. The decisions which it cites [M., p. 9] are no longer the law in California.

> "These decisions were rendered before the adoption of the present Rules on Appeal . . . it is well established today that the opinion may be used for some purposes such as explaining the basis of the court's ruling. . . ."
>
> *Tevis v. Beigel*, 156 Cal. App. 2d 8, 13-14, 319 P. 2d 98 (1957).

Moreover, the action of the trial court which plainly held the book herein to be "obscene" solely under the *Hicklin* test—and in disregard of the constitutional test—cannot now avoid review "under the name of local practice." *Davis v. Wechsler*, 263 U. S. 22, 24. And "this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 293. See also, *Butler v. Michigan*, 352 U. S. 380.

The majority opinion of the court below states that "under any test, the book concerned in this prosecution was properly held to be obscene by the trial court" (App. A, p. 2). The reference to "any test" indicates that the court below recognized that the trial court had used the *Hicklin* test. Approval of the use of such test, the only test under which appellant was convicted, rendered the

judgment of the court below equally vulnerable [J., p. 34]. Moreover, the court below itself emphasized the *Besig* standard (App. A, p. 3), a standard equivalent to the *Hicklin* test [J., p. 34].

Appellee has made no attempt to show that the federal question here is not substantial. The technical objections which it has raised to avoid discussion on the merits are, it is submitted, without basis in law and without merit.

4. Appellant contends that the book "Sweeter Than Life" is not "obscene," and that the ordinance, as construed and applied to the said book, contravenes the free speech and due process provisions of the First and Fourteenth Amendments [J., pp. 37-40].

Appellee is silent on this question. It makes no effort to show why appellee deems the book "obscene" nor does appellee deny that the federal question is substantial.[4]

In its "conclusion" [M., p. 10], appellee states that both courts below found the book to be "obscene," allegedly indicating "that such book is not within the area of constitutionally protected speech or press" [M., p. 10]. Whether the book herein is within the area of constitutionally protected speech or press is precisely one of the constitutional questions raised here. As Mr. Justice Harlan stated in *Alberts v. California*, 354 U. S. 476, 497, the question is

---

[4]Disapproval of the thematic material appears to have been the principal basis for the proscription of the motion picture, "Lady Chatterley's Lover" in *Kingsley International Pictures Corp. v. Regents*, 4 N. Y. 2d 349, 175 N. Y. S. 2d 39. Upon claims of violation of the free speech and due process provisions of the Fourteenth Amendment, this Court noted probable jurisdiction. October Term, 1958, No. 394, 27 L. W. 3161 (November 24, 1958). Similar constitutional questions are involved here with respect to the book "Sweeter Than Life," and for similar reasons justify the acceptance of jurisdiction in this case, it is respectfully submitted.

one of "constitutional *judgment* of the most sensitive and delicate kind," which cannot be avoided by asserting that the triers of the facts have labeled the questioned matter "obscene." See also, *Times Film Corp. v. City of Chicago*, 355 U. S. 35; *Sunshine Book Co. v. Summerfield*, 355 U. S. 372; *One, Inc. v. Olesen*, 355 U. S. 371.

Conclusion.

The Jurisdictional Statement presents substantial constitutional questions of public importance which should be decided by this Court. This Court plainly has jurisdiction to review. Appellee's motion to dismiss and/or affirm is untenable. Further argument properly awaits hearing on the merits.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Appellant.

SAM ROSENWEIN and
BROCK, FLEISHMAN & RYKOFF,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 9

ELEAZAR SMITH,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Appeal From a Judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

BRIEF FOR THE APPELLANT.

STANLEY FLEISHMAN,
1741 North Ivar Avenue,
Los Angeles 28, California,
Counsel for Appellant.

SAM ROSENWEIN,
PAUL C. ROSS,
BROCK, FLEISHMAN & RYKOFF,
Of Counsel.

SUBJECT INDEX

PAGE

Opinion below 1

Jurisdiction 1

Constitutional provisions and statutes involved 3

Questions presented 4

Statement of the case 6

Argument 10

Summary of argument 10

I.

The municipal ordinance—punishing an innocent proprietor of a book store for the possession of an alleged obscene book—violates the free speech provisions of the First and Fourteenth Amendments and arbitrarily deprives appellant of his liberty and property without due process of law contrary to the due process requirements of the Fourteenth Amendment.. 16

A. The ordinance impinges directly on the exercise of freedom of speech and press, thus differentiating it from the existing class of "public welfare" offenses 19

B. The burdens laid on the honest bookseller by the ordinance are impossible to meet and result in a deterrence of constitutionally protected speech and press 25

C. The exclusion of scienter and intent from the law, the indiscriminate lumping together of the innocent and the guilty, the knowing and unknowing, and the resultant curtailment of protected speech make the ordinance invalid because offensive to the due process requirements of the Constitution 30

D. The ordinance, which unfairly punishes the honest bookseller and unduly restricts freedom of communication, is unreasonable, arbitrary and irrational 36

II.

PAGE

The book "Sweeter Than Life" is constitutionally protected speech. The judgment of the courts below that the book is obscene under the ordinance clearly violates the free speech and due process provisions of the First and Fourteenth Amendments 44

III.

The denial by the courts below of all opportunity to prove by competent evidence that the book involved herein was not obscene, violates the free speech provisions of the First and Fourteenth Amendments and arbitrarily and discriminatorily deprives appellant of a fair trial and his liberty and property without due process of law in violation of the applicable provisions of the Fourteenth Amendment..... 65

IV.

The courts below improperly applied the unconstitutionally restrictive Hicklin-Besig test..... 74

Conclusion 83

Appendix "A"—Constitutional provisions and statutes involved .....App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Adler v. Board of Education, 342 U. S. 485	33
Abrams v. United States, 250 U. S. 616	46
Ahart, Matter of, 172 Cal. 762, 159 Pac. 160	43
Alberts v. California, 354 U. S. 476	2, 5, 11, 14, 16, 19, 26, 27, 28, 31, 32, 34, 35, 39, 42, 45, 47, 53, 54, 69, 74, 75, 77, 80
American Communications Assn., C. I. O. v. Douds, 339 U. S. 382	40
Associated Press v. United States, 326 U. S. 1	24
Attorney General v. Simpson, 93 Irish Law Times 33 (Feb. 28, 1959)	34
Baender v. Barnett, 255 U. S. 224	22
Bailey v. Alabama, 219 U. S. 219	73
Bennett v. State, 311 S. W. 2d 826	34
Besig v. United States, 208 F. 2d 142	5, 8, 81, 82
Boyce Motor Lines v. United States, 342 U. S. 337	32
Bridges v. California, 314 U. S. 261	38
Butler v. Michigan, 352 U. S. 380	5, 18, 21, 77, 82
Cantwell v. Connecticut, 310 U. S. 296	21, 37, 46, 79
Chambers v. Florida, 309 U. S. 227	72
Chaplinsky v. New Hampshire, 315 U. S. 568	53
Chin Yow v. United States, 208 U. S. 8	73
City of Cincinnati v. Walton, 145 N. E. 2d 407	34
Cole v. Arkansas, 333 U. S. 196	82
Comm. v. O'Harrah, 262 S. W. 2d 385	22
Dennis v. United States, 341 U. S. 494	38
Fox v. Washington, 236 U. S. 273	33
Grosjean v. American Press Co., 297 U. S. 233	21, 73
Grove Press and Readers Subscription, Inc. v. Christianberry, U. S. Dist. Ct., So. Dist. N. Y., No. 147-187	59

PAGE

Hague v. C. I. O., 307 U. S. 496 44
Hannegan v. Esquire, Inc., 327 U. S. 146 20
Herndon v. Lowry, 301 U. S. 242 73
Hicklin and R. v. Seeker and Warburg, 2 All E. R. 683 35
Hicklin, L. R. 3 Q. B. 360 ..... 5, 15, 16, 69, 77, 81, 82
Holden v. Hardy, 169 U. S. 366 72
Hovey v. Elliott, 167 U. S. 409 72
Hygrade Provision Co. v. Sherman, 266 U. S. 497 32
Independent Warehouses, Inc. v. Scheele, 331 U. S. 70 3
International Harvester Co. v. Kentucky, 234 U. S. 216 25
Jamison v. Texas, 318 U. S. 413 ..... 3, 24
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 20
Jackson, Ex parte, 96 U. S. 727 25
Katzev v. County of Los Angeles, 52 A. C. 372 38
King Manufacturing Company v. City Council of Augusta, 277 U. S. 100 3
King v. Ewart, 25 N. Z. L. R. 709 39
Kingsley Books, Inc. v. Brown, 354 U. S. 436 ..... 24, 43
Kingsley Int. Pic. Corp. v. Regents, 79 S. Ct. 1362 ..... 19, 27, 35, 36, 46, 53, 54, 68, 79
Kovacs v. Cooper, 336 U. S. 77 ..... 20, 24
Lambert v. California, 355 U. S. 225 ..... 3, 22
Lovell v. Griffin, 303 U. S. 444 24
Manley v. Georgia, 279 U. S. 1 73
Marsh v. Alabama, 326 U. S. 501 54
Martin v. Struthers, 319 U. S. 141 ..... 25, 45
Mooney v. Holohan, 294 U. S. 103 73
Morgan v. United States, 298 U. S. 468 72
Morissette v. United States, 342 U. S. 246 ..... 21, 22, 33
Morrison v. California, 291 U. S. 82 73

PAGE

Mounce v. United States, 355 U. S. 180, reversing 247 F. 2d 148 ..... 27, 54, 82

Murdock v. Pennsylvania, 319 U. S. 105 46

Nigro v. United States, 4 F. 2d 781 22

One, Inc. v. Olesen, 355 U. S. 371, reversing 241 F. 2d 772 ..... 27, 54

Palko v. Connecticut, 302 U. S. 319 72

Pennekamp v. Florida, 328 U. S. 331 21

People v. Cole, 113 Cal. App. 2d 253, 248 P. 2d 141 43

People v. Condiotto, 128 Cal. App. 2d 347, 275 P. 2d 500 43

People v. Stuart, 47 Cal. 2d 167, 320 P. 2d 5 43

People v. Wepplo, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853 ..... 26, 42, 67

People v. Winston, 46 Cal. 2d 151, 293 P. 2d 40 43

People v. Vogel, 46 Cal. 2d 798, 299 P. 2d 850 43

Poulos v. New Hampshire, 345 U. S. 395 3

Powell v. Alabama, 287 U. S. 45 73

Pyle v. Kansas, 317 U. S. 213 73

Rosen v. United States, 161 U. S. 29 (Note 28) 33

Roth v. United States, 354 U. S. 476 ..... 11, 14, 16, 27, 28, 31, 33, 34, 37, 42, 47, 54, 75, 80

Saunders v. Shaw, 244 U. S. 317 73

Schneider v. Irvington, 308 U. S. 147 ..... 21, 25

Schneider v. State, 308 U. S. 147 18

Screws v. United States, 325 U. S. 91 31

Speiser v. Randall, 357 U. S. 513 ..... 19, 21, 23, 33, 71

State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678 28

State v. Sul, 146 Conn. 78, 147 A. 2d 78 ..... 34, 41

Staub v. City of Baxley, 355 U. S. 313 ..... 18, 21, 30

Stromberg v. California, 283 U. S. 359 82

Sunshine Book Co. v. Summerfield, 355 U. S. 372, reversing 249 F. 2d 114 ..... 27, 54

PAGE

Sweezy v. New Hampshire, 354 U. S. 234 ..... 21, 30
Terminiello v. City of Chicago, 337 U. S. 1 ..... 45, 46
Thomas v. Collins, 323 U. S. 516 ..... 21, 45
Thornhill v. Alabama, 310 U. S. 88 ..... 20, 30, 52, 76
Times Film Corp. v. City of Chicago, 355 U. S. 35, reversing 244 F. 2d 432 ..... 27, 54
Tot v. United States, 319 U. S. 463 ..... 33, 41, 71, 73
United States v. Balint, 258 U. S. 250 22
United States v. Kennerly, 209 Fed. 119, ... 82
United States v. Raigen, 314 U. S. 513 32
United States v. Wurzbach, 280 U. S. 396 32
Whitney v. California, 274 U. S. 357 71
Wieman v. Updegraff, 344 U. S. 183 ..... 18, 30
Winters v. New York, 333 U. S. 507 ..... 25, 31

MISCELLANEOUS PAGE

American Law Institute's Model Penal Code, Tentative Draft No. 6, 1927, pp. 1-4 31

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STATUTES

PAGE

California Constitution, Art. VI, Sec. 5 2
California Penal Code, Sec. 20, Subd. 4 42
California Penal Code, Sec. 26, Subd. 6 42
California Penal Code, Sec. 311, Subd. 3 3
California Penal Code, Sec. 312 43
California Penal Code, Sec. 313 43
California Penal Code, Sec. 314 43
California Penal Law, Sec. 311 ..... 42, 74
Los Angeles Municipal Code, Sec. 41.01.1 (Ord. No. 77,000 as amended) 2, 3, 4, 5, 65
Los Angeles Municipal Code, Sec. 41.01 65
North Carolina, Session Laws, 1957, C. 1227 41
United States Code, Title 28, Sec. 1257, Subd. 2 3
United States Constitution, First Amendment 3, 4, 5, 9, 17, 44
United States Constitution, Fifth Amendment 41
United States Constitution, Fourteenth Amendment 3, 4, 5, 6, 9, 13, 17, 41; 44

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Chafee, Freedom of Speech in the United States (1941), p. 150 .. 53

PAGE

Chafee, Free Speech in the United States (1941), p. 531 39

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PAGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 519

ELEAZAR SMITH,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Appeal From a Judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

BRIEF FOR THE APPELLANT.

Opinion Below.

The opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles was by a divided court (2-1), Swain, J. dissenting in a separate opinion [R. 9-18]. The said opinions are reported in 161 Cal. App. 2d Supp. 860, 327 P. 2d 636. The trial court rendered no written opinion.

Jurisdiction.

(a) Appellant appeals from the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, entered and filed June 23, 1958 [R. 18-19]. A petition for re-

hearing was denied by the said court on June 30, 1958 without opinion, again by the same divided court, Swain, J. being of the opinion that the petition should be granted [R. 19].

The Appellate Department of the Superior Court is the highest state court available to appellant. (*Calif. Const.*, Art. VI, Sec. 5; *Alberts v. California*, 354 U. S. 476, 481, n. 6.)

Notice of appeal to this Court was filed in the Appellate Department of the Superior Court on September 17, 1958 [R. 92-96]. The case was docketed in this Court on November 14, 1958. Probable jurisdiction was noted on January 19, 1959 [R. 96].

(b) The appellant was found guilty [R. 8] in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, solely under Count VII of a complaint [R. 2-3] which charged appellant with a violation of Section 41.01.1 of the Los Angeles Municipal Code (Ord. No. 77,000). The complaint was originally in seventeen counts [R. 3], some of which were dismissed prior to trial [R. 5], and the remainder at the conclusion of the trial [R. 8]. Following the finding of guilt under Count VII, the appellant was sentenced to imprisonment in the City Jail of the City of Los Angeles for a term of 30 days [R. 8-9].

Count VII of the complaint [R. 2] charged that on or about November 19, 1956, appellant violated Section 41.01.1 of the Los Angeles Municipal Code (Ord. No. 77,000) in that he did wilfully and unlawfully at 518 South Main Street, in the City of Los Angeles, "have in his possession an obscene and indecent writing, book, pamphlet, picture, photograph and drawing, to wit: Sweeter Than

Life, in a place of business where magazines, books, pamphlets, papers and pictures were sold and kept for sale."

The constitutional validity of Section 41.01.1 of the Los Angeles Municipal Code was drawn in question in the Statement on Appeal [R. 3-8] on the ground of its being repugnant to the First and Fourteenth Amendments to the United States Constitution. The State Court, in affirming the validity of Section 41.01.1, on it face and as applied to appellant and the book "Sweeter Than Life," rejected appellant's assertions that the ordinance was repugnant to the United States Constitution [R. 9-16].

(c) This Court's jurisdiction to review the judgment is conferred by Title 28, United States Code, Section 1257, subdivision 2. The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal in this case: *King Manufacturing Company v. City Council of Augusta*, 277 U. S. 100; *Jamison v. Texas*, 318 U. S. 413, 414; *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 79; *Poulos v. New Hampshire*, 345 U. S. 395, 402; *Lambert v. California*, 355 U. S. 225, 227.

Constitutional Provisions and Statutes Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, Section 41.01.1 of the Municipal Code of the City of Los Angeles (Ord. No. 77,000, as amended) and California Penal Code, Section 311, subdivision 3, are set forth in Appendix "A" hereto.

Questions Presented.

1. Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, by imposing absolute strict criminal liability for the mere possession of an "obscene" book in a place of business where books are sold or kept for sale, without requirement of proof of the defendant's knowledge of the contents or character of the book or intent to sell, and without regard to proof by defendant of the absence of such knowledge and intent, upon its face and as construed and applied, and the prosecution thereunder of appellant in the instant case, abridges the freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including this appellant of liberty and property without due process of law and arbitrarily denies them the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

2. Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, upon its face and as construed and applied to appellant, by the holdings of the courts below that the book named in the complaint herein, "Sweeter Than Life," is "obscene" under the Ordinance, abridges the freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including this appellant of liberty and property without due process of law and arbitrarily denies them the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

3. Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, upon its face, and as construed and applied to appellant, by the holdings of the courts below that no evidence was admissible in a prosecution under the ordinance on behalf of appellant to show the artistic; literary, scientific and educational merits of the book named in the complaint; to show what the predominant appeal of the book would be to the average person and the effect on his behavior; to show the degree of public acceptance of the material contained in the book; and to show the absence of appeal to prurient interest, abridges the freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution, and arbitrarily deprives persons including this appellant of liberty and property without due process of law and arbitrarily denies them the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

4. Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, upon its face, and as construed and applied to appellant, by the holdings of the courts below that the unconstitutionally restrictive (*Hicklin* (L. R. 3 Q. B. 360) and *Besig*, 208 F. 2d 142 (C. A. 9, 1953)) standards for judging the obscenity of a book, to wit, the effect of isolated excerpts upon particularly susceptible persons, were applicable to the book named in the complaint herein, which standards are materially different from the constitutional tests adopted in *Alberts v. California*, 354 U. S. 476 and *Butler v. Michigan*, 352 U. S. 380, abridges the freedom of speech and press guaranteed by the provisions of the First and Fourteenth Amend-

ments to the United States Constitution, and arbitrarily deprives persons including this appellant of liberty and property without due process of law and arbitrarily denies them the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

Statement of the Case.

(a) The case against appellant was as follows: a police officer testified that on the 19th of November, 1956, he visited the premises located at 518 South Main Street, in the City of Los Angeles [R. 27], described by the officer as "an average sized bookstore" [R. 31]. The officer purchased some magazines "and a book, Sweeter Than Life" [Peo. Ex. A-1; R. 28-29]. The purchase was from a clerk in the book store, a Mr. Rothweiler, who was immediately arrested [R. 21], because he had sold the aforesaid material to the officer [R. 29]. There is no dispute that appellant was the proprietor of the aforesaid shop at the time of his clerk's arrest [R. 4]. Attempts by cross-examination of the police officer to show that the accused had reason to believe from the prior conduct of the authorities that the material was not obscene were blocked by the trial court [R. 33-34]. It seemed to the trial court, a jury trial having been waived [R. 4], that such issues were "out" of the case, since the prosecution was "not under 311" [R. 34].

The appellant testified that he was 72 years of age [R. 37]; had been in the book business for about eight years and at the instant place of business for about two

years [R. 37]. The books he purchased came principally from New York through the mails [R. 38], both new and used [R. 39]. Purchases were made usually on the basis of circulars [R. 39] or publishers' catalogs [R. 42]. There are at least several thousand books in the store [R. 39]. The appellant did not read the book here involved [R. 37]. It had been some time since he read a book; it would take him about three months to read one [R. 38-39]. Appellant had no reason to believe that the book contained any objectionable material, and would not have handled any book or magazine he thought was obscene [R. 38]. To the best of his ability, appellant was trying to run a lawful business [R. 38]. On cross-examination appellant confirmed the instructions to his clerk [R. 35-37] not to let any person under 21 years of age handle any books or magazines [R. 40-43].

The appellant offered on his own behalf the witnesses, Robert R. Kirsch, book review critic of the Los Angeles Times, and Dr. Zoltan Gross, a clinical psychologist. Their essential testimony, discussed in the argument which follows, was rejected by the trial court, as were offers of proof in connection therewith [R. 43-56, 56-74]. Broadly, the evidence sought to establish that the book involved herein, taken as a whole, applying community standards, does not appeal to the prurient interest of the average person, nor does the book have a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.

The book "Sweeter Than Life" [Peo. Ex. A-1; R. 28-29] (the ony writing under Count VII, and the only

writing upon which appellant was adjudged guilty), is an ordinary size (181 pages) hard cover book. The book was written by Mark Tryon, published in New York, and the frontispiece indicates that the book was copyrighted in 1954 by the publisher. The book is in the Library of Congress and listed in its Union Catalog under the number: PZ4.T876Sw.

(b) The trial judge held that the book should be tested by its effect on youth [R. 77, 79, 82, 90]; that the ordinance "can't be applied to those who are already vaccinated, you might say, by experience and by time" [R 77]. The trial judge stated that he was depressed by the reading of the book [R. 82] because one of the characters in the book had been a perfectly normal woman at the outset, and after an unwilling experience, had become an entirely altered person [R. 81-82]. The trial court excluded any test of acceptable community standards with relation to theme or description [R. 86-90].

The Appellate Department did not discuss the contents or the subject matter of the book. The court held that it shared the conclusion of the trial court that the book was obscene [R. 10]. Since the book was "obscene" it was "not constitutionally protected" [R. 10]. The argument relative to accepted community standards was dismissed as being simply an argument that "popular" books "may not be suppressed," a view which the court rejected [R. 11]. While stating that the court had considered the book as a whole, it held that there were commonsense limits to the "over all view," citing *Besig v. United States*, 208 F. 2d 142, 146 (C. A. 9; 1953) [R. 11].

As noted aforesaid, a majority of the court also held that the municipality could constitutionally prohibit a book seller from possessing or keeping an obscene book in his store, dispensing with all requirements of knowledge or *scienter* [R. 15], the ordinance being analogized to those "public welfare" offenses involving adulterated foods, narcotics and abatement of nuisances [R. 13].

Not only was the appellant held properly precluded from any defense of lack of knowledge or intent, but he was also held properly stripped of any right to prove by evidence that the book itself was not obscene, measured by community standards [R. 10-11].

The court held that the ordinance, on its face and as construed and applied, was not repugnant to the First and Fourteenth Amendments to the United States Constitution [R 10-16].

Swain, J., in dissenting stated:

> "It is obvious from a reading of the Penal Code Sec. 311(3) and the use of 'lewdly' therein that the legislature intended to give all proprietors of book stores throughout the State protection of the *scienter* rule. This is a wise and just provision because those proprietors customarily buy books from advertisements sent out by the publishers. Such dealers order books without an opportunity to read them in advance. I would reverse the judgment" [R. 18].

ARGUMENT.

Summary of Argument.

1. The ordinance here punishes the proprietor of an establishment where books, pamphlets, magazines or papers are kept for sale if the proprietor unknowingly and without lewd intent possess an "obscene" book. Since the ordinance impinges directly on the exercise of speech and press, the law must be subjected to close analysis and critical judgment. That requirements of *scienter* and intent have been omitted in certain narrow and limited cases affecting articles like deadly weapons, adulterated foods and narcotics does not justify the assumption that the same omissions can be constitutionally supported under a law affecting the exercise of freedoms of speech and press. An ordinance, which in operation and effect, may unduly curtail the exercise of constitutionally protected speech and press must be tested by standards basic to an open, democratic society; standards quite distinct from those in "public welfare offenses" which measure the validity of regulatory legislation affecting the revenue or which create a summary mode of enforcing a civil right.

The burdens laid by the action of the municipality on the honest bookseller, and speech and press activities, are to a large extent simply impossible to assume. The reading of the contents of all the books, magazines, pamphlets and papers in a book store would consume so much time and energy as to make continuation of the establishment futile. Moreover, the standards fixed for testing "obscenity" are complex; they call for such difficult determinations as the nature of the appeal of a book, taken as a whole, to the "prurient interest" of the average person, and whether the book goes beyond "contemporary com-

munity standards" in theme or description. Determining the "predominant" appeal of a book or its "substantial tendency" under such circumstances truly calls for gifts which mankind does not possess.

If a bookseller is to become the absolute guarantor of the sexual purity of all the books on his shelves, if in a criminal prosecution there is no consideration of the good faith and reasonable precautions which the bookseller took, then clearly the bookseller can adopt the alternative of leaving a business fraught with such danger to his livelihood and reputation, or steer far wide of any official or unofficial censorship by keeping from the public virtually every writing which portrays or depicts sex in art, literature or science. The one who is least able to defend books when they are under censorial attack is a bookseller, and if a bookseller who tries to obey the law is to be treated the same as one who breaks it, then the only result will be a complete diminution of the circulation of the press in its most comprehensive sense.

The ordinance here eliminates all personal blameworthiness in interdicting "obscenity." The guilty and the innocent, the knowing and the unknowing, are indiscriminately lumped together. In *Roth* and *Alberts* the statutes were construed as requiring consideration of the elements of *scienter* and intent. The statutes, as thus construed, were held to be not so indefinite as to offend due process requirements. State courts and courts of foreign countries have construed the decision of this Court in *Roth-Alberts* as making the elements of knowledge and intent an ingredient of the constitutional test for "obscenity." But here the ordinance punishes the honest bookseller, the person who concededly is not intent on wrongdoing nor deliberately risking the chance of crossing the line. The ordinance

as thus construed and applied, is vague and indefinite, and so loose as to make it possible to sweep within its condemnation permissible expression.

The ordinance is unreasonable, arbitrary and irrational, without substantial relation to the ostensible object for which it was enacted. Instead of encouraging booksellers to "protect public morals" by using good faith precautions, this ordinance drives them in the opposite direction. The ordinance does not deal with the "commercial exploitation of cravings for materials with prurient effect." It deals only with possession in a book store, where the average adult who makes a purchase, or browses, is capable of protecting himself. To place a bookseller under the absolute obligation to make himself aware of the contents and nature of every book in his shop is to demand an approach to omniscience. It is unjust and arbitrary to convict a morally innocent man of an offense which inherently can be attributed only to an immoral person. The most that the law can reasonably expect from a proprietor of a book shop with respect to the possession of an "obscene" book is that he act with the utmost good faith and take reasonable precautions to avoid such possession.

The argument that a proprietor will exculpate himself too readily by falsely concealing his knowledge, if knowledge and intent are considered by the trier of the facts, is fallacious. The trier of the facts need not believe the bookseller. Courts and juries pass every day on questions of state of mind, inferred generally from all the circumstances shown in the record. The argument of "difficulty of proof" is also without merit. Universal experience, including experience in the State of California, shows that requirements of *scienter* have not hindered successful obscenity prosecutions. Moreover, there are alternative and effective means of reaching "obscene" books and "guilty"

persons available to the municipality without casting the net so large as to affect innocent persons engaged in constitutionally protected speech and press activities.

The ordinance, as construed and applied, abridges freedom of speech and press, arbitrarily restricts the circulation of ideas, carries the pervasive and coercive threat of censorship and arbitrarily disregards all bona fide attempts to comply with the law. The ordinance thus deprives appellant of his liberty without due process of law in violation of the due process clause of the Fourteenth Amendment.

2. The book, Sweeter Than Life, by Mark Tryon, a hard cover book, without illustrations or drawings, is a novel which expresses ideas entitled to constitutional protection. This Court has noted the tremendous breadth and scope of ideas which are protected from all governmental infringement by the Constitution. The "obscenity" limitation upon the exercise of the fundamental right to communicate ideas must be narrowly confined, this Court has stated,—the door opened only a "slight crack"—if vital constitutional safeguards are to be maintained.

Upon a review of the story of Sweeter Than Life, and a delineation of the characters therein, it is apparent that the work has many insights to furnish. The idea that sexual variance in persons is often the outgrowth of mistaken attitudes on the part of parents, or of an unwholesome home life; that sexual variants suffer subjectively with ambivalent feelings of remorse and exultation; that a person so constituted can obtain little by merely carrying on a personal struggle against society, are ideas of social importance.

There is no relation between this book and the "hard core pornography" which this Court was assured by the

Solicitor General in *Roth-Alberts* was the principal target of the "obscenity" statutes. Lesbianism is a fact of life. It has been the subject of extended study and discussion by scientists and novelists alike. Imaginative writings dealing with themes of male and female homosexuality are extensive in the literature of the world, including the United States. Moreover, it is commonly agreed that not only the scientist, but the novelist, has much to give the general public in this area in the form of insights which can only be of benefit to individuals in society. Indeed, it is the novel which has been the key to the understanding of much of the mystery of sex, not only for the average person, but for scientists as well.

The predominant appeal of the writing here is not to a prurient interest, nor does it go substantially beyond customary limits of candor in description of sex. This Court can notice the very great changes which have taken place in the twentieth century in both the areas candidly open to literary treatment, and the directness with which these areas are treated. A far more tolerant, liberal climate for literature exists today than existed at the turn of the century. Even a brief review of literary history makes this clear.

The book here involved is devoid of all Anglo-Saxon colloquialisms so prevalent today in realistic novels. It contains a plot as well as scenes relevant and integral to the plot, and dimensional characters. In theme, realistic detail or description, the book herein hardly compares with literally dozens of best seller and award winning novels which have appeared in hard cover books, paper back and motion pictures. It is plain from a persual of the contemporary scene that there is a broad public acceptance of discussion of virtually all themes of sex, and sex vari-

ance, and that there is a frankness and candor in discussion of these themes, which the book herein does not even attempt.

To deprive the book herein of constitutional protection would not only cut into core principles governing our society, but set a dangerous precedent for the "village tyrant" to use against all books.

3. The denial of all opportunity to prove by competent evidence that the book herein was not obscene deprived appellant of a fair trial and his liberty without due process of law. The two crucial issues for the trier of the fact in an "obscenity" trial are the predominant appeal of the material to the average normal person, and the outer limits of custom in description or representation of sexual matters. Unless these two issues are fairly decided, the danger exists that legitimate utterance will be penalized.

Fundamental in due process is a hearing and opportunity to defend. Deprivation of the right to present evidence bearing on the crucial issues of a case, as was done here, has been specifically held to be a denial of due process. Moreover, this denial of procedural due process leads inevitably to a denial of substantive due process.

4. The standards employed by the courts below for judging "obscenity" were clearly incompatible with the free speech and due process provisions of the Constitution. In important respects, the court below applied unconstitutional standards in determining that the book herein is not to be read by the people.

The trial court, sustained by the court below, measured the book by the *Hicklin* test, the effect of the book on youth or susceptible adults. Essentially, it was the theme

of the book which the courts below disapproved; whether the book had a predominant appeal to the prurient interest of the average adult was not explored. All questions of "contemporary community standards" were ignored, that is, whether the book went substantially beyond customary limits of candor in description or representation.

In short, the ordinance here was construed and applied so as to eliminate all consideration of personal conduct of the accused and to exclude all attempts to prove by evidence that the book was not "obscene." Then, applying essentially the *Hicklin* test and disregarding entirely the *Roth-Alberts* test, the courts below concluded that the novel herein involved was not entitled to constitutional protection—and sentenced appellant to imprisonment.

I.

The Municipal Ordinance—Punishing an Innocent Proprietor of a Book Store for the Possession of an Alleged Obscene Book—Violates the Free Speech Provisions of the First and Fourteenth Amendments and Arbitrarily Deprives Appellant of His Liberty and Property Without Due Process of Law Contrary to the Due Process Requirements of the Fourteenth Amendment.

The municipality herein has made the proprietor of every establishment in the City of Los Angeles where "magazines, books, pamphlets, papers . . . are sold or kept for sale" strictly liable, on pain of fine and imprisonment, for the sexual purity of each of the writings found within the confines of his premises [R. 9-16]. In order "to protect the public morals" [R. 11], the municipality has admittedly adopted a "more restrictive" [R. 13] measure than the State, to wit: criminal prosecution and punishment by fine and imprisonment of proprietors of estab-

lishments who, without knowledge of its character or contents, and without any lewd intent—without *mens rea* or *scienter*—possess an "obscene" book. To protect the municipality's "standards" of "morality" [R. 11], those who seek to obey the law forbidding the possession of "obscenity" are to be punished equally with those who seek to break the law.

Appellant submits that the ordinance here, thus construed and applied, deprives appellant of his liberty and property without due process of law in violation of the applicable provisions of the Fourteenth Amendment. Appellant asserts, first, that the broad enactment in operation and effect, results in an abridgment of appellant's liberty of free speech and press as well as a denial to all individuals including appellant of the benefit of participation in the exchange and formulation of ideas which the First Amendment and the Fourteenth Amendment seek to protect. The action of the municipality arbitrarily restricts the processes by which ideas may be changed. The legislation as construed and applied, carries the pervasive and coercive threat of censorship with the resultant restrictions of the free dissemination of ideas protected by the fundamental law.

Moreover, since bona fide attempts to comply with the ordinance here will be fruitless as a defense, and since the consequence thereof will plainly be a sharp curtailment of speech and press activities, the statute must be condemned as too arbitrary and too indefinite to satisfy the due process clause of the Fourteenth Amendment.

Finally, this "indiscriminate classification of innocent with knowing activity" (*Wieman v. Updegraff*, 344 U. S. 183, 191), this punishment of the honest proprietor of establishments where books are sold, this exposure of an honest bookseller to the hazards of an unfair conviction with the inevitable burdens such state action lays on the "exercise of liberty protected by the Constitution" (*Staub v. City of Baxley*, 355 U. S. 313, 325)—arbitrarily curtails the liberties of persons in a manner "not reasonably restricted to the evil with which it is said to deal." (*Butler v. Michigan*, 352 U. S. 380, 383.) To protect the "public morals" from obscene publications in bookshops, the municipality has adopted legislation which will result in the closing of many establishments where the "press" is circulated and the sharp curtailment of the circulation of ideas and diminution in the discussion of the "heart of things" which are so essential to a liberty loving society. Nothing, moreover, would be more calculated to discredit institutions and to encourage cynicism and law breaking than legislation which uses the means of fining and imprisoning "moral" booksellers to reach "immoral" books. Clearly, effective means are available to the municipality to suppress "obscene" publications and to punish those "intent on wrongdoing" without the necessity of enacting such broad legislation as sweeps within its ambit protected speech and press and innocent activity. (*Schneider v. State*, 308 U. S. 147, 162.)*

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*"Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U. S. 380, 383.

A. The Ordinance Impinges Directly on the Exercise of Freedom of Speech and Press, Thus Differentiating It From the Existing Class of "Public Welfare" Offenses.

By its very terms, the legislation prohibits the possession of "obscene" books where "magazines, books, pamphlets, papers" are kept for sale [R. 10]. Thus, the so-called "illegitimate" speech is linked with the "legitimate" speech, and the separation of the two appears to be the principal aim of the statute. It does not, therefore, meet the issue here to merely assert, as did the court below, that obscenity is not "constitutionally protected speech" [R. 10].

Moreover, "as cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may be regulated, suppressed or punished is finely drawn." (*Speiser v. Randall*, 357 U. S. 513, 525.) Thus, sex and obscenity are not synonymous, and the portrayal of sex in art, literature and scientific works "is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." (*Alberts v. California*, 354 U. S. 476, 487.) Where transcending values of liberties of speech and the person are involved "ceaseless vigilance is the watchword" (*Alberts v. California, supra*, at p. 488) to prevent the obliteration of the line between "permissible expression" and that which "society may permissibly prohibit." (*Kingsley Int. Pic. Corp. v. Regents*, 79 S. Ct. 1362, 1368.)

In addition, we deal here with a concededly innocent proprietor of a bookstore. The legislation, as construed and applied, assumes the existence of legitimate booksellers whose wares normally include information and education with respect to the significant issues of the time appropriate to enable the members of society "to cope with the

exigencies of their period" (*Thornhill v. Alabama*, 310 U. S. 88, 101-102), material which is "entertaining" (*Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501), and even material which "seems to one to be trash [but which] may have for others fleeting or even enduring values" (*Hannegan v. Esquire, Inc.*, 327 U. S. 146, 158). It is this bookseller with this material, who unwittingly possesses an alleged "obscene" book, that the municipality has chosen to punish by imprisonment.

The ordinance, therefore, trenches upon areas of free speech and free press. Whether such action of the municipality exceeds the bounds of constitutional power is one of the important questions presented on this appeal—important not only to appellant but to the public as a whole, for if Los Angeles can coerce and punish the innocent possession of an "obscene" book in a place where books, magazines and papers are sold or kept for sale, "all cities can do the same," Mr. Justice Black, dissenting in *Kovacs v. Cooper*, 336 U. S. 77, 103.

If the ordinance affects the exercise of freedoms of speech and press, it is not enough to justify its validity to merely assert that it is a "public welfare" law and governed by the rules affecting "public welfare offenses."

That speech and press are often found to be burdened and curtailed by statutes ostensibly aimed at evils which a state allegedly has a right to prevent has been noted. Rarely are direct attempts to restrict speech made; the effort or effect usually is to do by indirection what cannot be directly done under the Constitution.* In a large variety of cases (only a few decisions can be cited within the limits of this brief)—this Court has held invalid the exercise of

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*"It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads of these rights come from associating the speaking with

state power purportedly aimed at the regulation or punishment of evils within the reach of the states when the necessary operation and effect of the exercise of such power was to unduly limit or curtail free speech and press activities. *Cantwell v. Connecticut*, 310 U. S. 296 (common-law offense of breach of the peace, applied to utterances and communications); *Pennekamp v. Florida*, 328 U. S. 331 (contempt of court, applied to newspaper publications); *Schneider v. Irvington*, 308 U. S. 147 (attempt to prohibit distribution of literature on basis of avoiding littering the streets); *Grosjean v. American Press Co.*, 297 U. S. 233 (gross receipts license tax on newspapers ostensibly to support government); *Thomas v. Collins*, 323 U. S. 516 (regulation allegedly directed at fraudulent solicitations applied to union organizer discussing advantages of unions and of joining them). See also, *Staub v. City of Baxley*, 355 U. S. 313; *Sweezy v. New Hampshire*, 354 U. S. 234, 255-267; *Butler v. Michigan*, 352 U. S. 380. See, *Speiser v. Randall*, 357 U. S. 513, 530 (cases listed by Mr. Justice Black in his concurring opinion).

It is, of course, true that certain "public welfare-offenses" which disregard any ingredient of intent have been upheld, sometimes even against claims of constitutional invalidity. As the court's opinion below shows, these have been statutes dealing with deadly weapons, adulterated foods, narcotics [R. 14-16] and other goods of a similar nature.* Generally, these offenses have been en-

some other factor which the state may regulate so as to bring the whole within official control." Jackson, J., concurring in *Thomas v. Collins*, 323 U. S. 516, 547.

*The most extensive list was compiled by Professor Sayre, *Public Welfare Offenses* in 33 Columbia L. Rev. 54, 84-88 (1933). Mr. Justice Jackson reviewed the history and development of these offenses in *Morissette v. United States*, 342 U. S. 246, 252-260.

acted either for the protection of the revenue or to create a summary mode of enforcing a civil right. Mr. Justice Jackson stated in *Morissette v. United States*, 342 U. S. 246, that the *scienter* requirement ordinarily has been removed where (1) "the accused, if he does not will the violation, usually is in a positon to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities;" (2) "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation" (*supra*, at p. 256).*

But while "public welfare offenses" have been upheld under such circumstances, it clearly is inadmissible to assert, as did the court below, that the doctrine of crimes

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*Discussion and criticisms of legislation creating "public welfare offenses" are voluminous. Mueller, *On Common Law Mens Rea* in 42 Minn. L. Rev. 1043, 1104 (1958); Hall, *Prolegomena to a Science of Criminal Law* in 89 U. of Pa. L. Rev. 549 (1941); Sayre, *Public Welfare Offenses* in 33 Cal. L. Rev. 55, 78 (1933); Laylin and Tuttle, *Due Process and Punishment* in 20 Mich. L. Rev. 614 (1922); Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code* in 42 A. B. A. J. 321, 323-324 (1956). The gist of the criticism is epitomized by Sayre: "To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement" (*supra*, at p. 56). As Mr. Justice Jackson noted in *Morissette*, the law on the subject is "neither settled nor static" (p. 260). See, for example, *Bacnder v. Barnett*, 255 U. S. 224, and *Nigro v. United States*, 4 F. 2d 781, 785 (C. A. 8, 1925), after this Court's decision in *United States v. Balint*, 258 U. S. 250. *Cf. Lambert v. California*, 355 U. S. 225, 229-230. See also, *Comm. v. O'Harrah*, 262 S. W. 2d 385, 388 (Ky., 1953). It should be noted that Mr. Justice Jackson in *Morissette* could not "fit" the ordinary "public welfare offenses" into the accepted classification of common-law offenses against "public morals" (p. 255), and, indeed, none of the wide literature on this subject appears to give any example of a "public welfare offense" which punishes the innocent possession of an "obscene" book by a bookseller.

without intent can be expanded without limit and applied in the area of speech with equal validity.

> "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." (*Speiser v. Randall*, 357 U. S. 513, 520.)

The line between a lawful and a proscribed narcotic, between adulterated food and untainted edibles, or between a dangerous weapon and a lawful firearm may be difficult to discern, but the mistaken suppression of some harmless commodities under such circumstances would not injure society tremendously. Society could even survive, it is submitted, the mistaken demolition of a bridge or building as a public nuisance.

It is quite a different matter for a mistake to be made in the line between "constitutionally protected speech" and that which is not so protected. While an interference with property rights may work an injustice to an individual, an interference with his liberties of speech and press works not only to his disadvantage but also to the disadvantage of the public as a whole. Whatever may be the varying philosophical notions relative to the position of the First Amendment freedoms in our constitutional system, none can deny, it is respectfully submitted, that at the very least:

> "in considering what interests are so fundamental as to be embraced in the due process clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum

> for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements"

Mr. Justice Frankfurter, concurring in *Kovacs v. Cooper*, 336 U. S. 77, 95. See, Note, *Inseparability in Application of Statutes Impairing Civil Liberties* in 61 Harv. L. Rev. 1208, 1209 (1948).

If the freedoms of speech and of press rest on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society (*Associated Press v. United States*, 326 U. S. 1, 20), then it would plainly appear that quite different considerations and standards govern the constitutional validity of the ordinance here than govern legislation dealing with adulterated food or proscribed narcotics.*

This Court has stated that the press in its historic connotation comprehends every sort of publication which affords a vehicle of information, opinion and entertainment; that the liberty of the press is not confined to newspapers and periodicals, but necessarily embraces books and pamphlets, which have proved more effective instruments in the dissemination of opinion. *Jamison v. Texas*, 318 U. S. 413; *Lovell v. Griffin*, 303 U. S. 444; *Schneider*

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*"Free speech is not to be regulated like diseased cattle and impure butter." Mr. Justice Douglas, dissenting in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 477. "We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our woolpacks." John Milton in *Areopagitica*. "Of course, it does involve freedom of expression and, therefore, one cannot treat it on the same level as dangerous drugs." Testimony of Norman St. John-Stevas before Select Committee on Obscene Publications, *Minutes of Evidence* (Eng., 1957), p. 101.

v. Irvington, 308 U. S. 147.) The constitutional guaranty of freedom of speech and press embraces distribution as well as publication, and necessarily protects the right to receive the matter distributed, since liberty of circulation is as essential to that freedom as liberty of publishing, and without the circulation the publication would be of little value. *Martin v. Struthers*, 319 U. S. 141, 143; *Winters v. New York*, 333 U. S. 507; *Ex parte Jackson*, 96 U. S. 727, 733.) Thus, the ordinance here strikes at the essential cog in the communication of ideas, at the bookseller who, on the contemporary scene, brings in large measure the "press" to the public from the publisher and distributor. The danger is that punishment of an honest bookseller for unknowing possession of an "obscene" book may tend to restrict the distribution of all books. It cannot follow, therefore, it is respectfully submitted, that because *scienter* has been omitted in some statutes affecting adulterated foods and narcotics, the same exclusion can be sustained when applied to speech and press activities.

B. The Burdens Laid on the Honest Bookseller by the Ordinance are Impossible to Meet and Result in a Deterrence of Constitutionally Protected Speech and Press.

The burdens cast upon the bookseller by the ordinance call for the exercise of multitudinous and multifarious efforts, for "gifts that mankind does not possess." (*International Harvester Co. v. Kentucky*, 234 U. S. 216, 223.) The mere reading of the contents of "several thousand books" and a "great variety of magazines" [R. 39] would consume such extended time and energy as to make futile the continuation of the establishment.* Moreover, books,

*In 1953, it was estimated that more than 500,000,000 copies of hardcover books were produced, and an additional total of about 250,000,000 paperbacks. Blanshard, *The Right to Read* (1955),

magazines, pamphlets and papers are in constant flow in any bookshop.

It was asserted below: "Those who are engaged in selling articles of a particular class to the public, have the first and best opportunity to know or be on notice of their characteristics, even though possession and not sale is involved" [R. 15]. But we deal here, not with the price of the book nor the quality of its paper, but whether each of the books, taken as a whole, has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires" (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853), or whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. *Alberts v. California*, 354 U. S. 476, 489. Here each book must be tested by factors which are not ascertainable by means of the crucible or the test tube.

Can it be fairly asserted that the honest proprietor of a bookstore is in a position to prevent the possession of an "obscene" book in his shop "with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities?" Determination of the "dominant theme" of even one book, its appeal to the "prurient interest" of

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p. 9. The volume of sales of paper bound books has mounted considerably, largely because of their modest price. Between 80 and 90 percent of the paper bound books are reprints of books previously published in hard covers. Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution* in 38 Minn. L. Rev. 295, 303 (1954). Looseness in definition makes it difficult to estimate the number of bookstores in the United States. The figures vary between 1500 and 2500. Blanshard, *supra*, p. 17; Gellhorn, *Individual Freedom and Governmental Restraints* (1956), p. 49.

an "average person" measured "by community standards" is a task of considerable proportions, involving intangibles and imponderables which tax the resources of those allegedly most knowledgeable. In *Roth-Alberts*, Mr. Justice Brennan stressed that "sex and obscenity are not synonymous" (at p. 487). Mr. Chief Justice Warren stressed the "nature of the materials" in the context of lewd "conduct" from which the materials "draw color and character" (at p. 495). Mr. Justice Harlan doubted that "obscenity" was as "distinct, recognizable, and classifiable as poison ivy . . ." (at p. 497), and suggested that determination of the characteristics of a book "involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind" (at p. 498). Indeed, on a number of occasions since the decision in *Roth-Alberts*, lower courts have condemned material as clearly "obscene" and "immoral," as clearly being nothing but "cheap pornography" calculated to promote "nudism" or "Lesbianism" only to have this Court reverse on the basis of *Roth-Alberts*. (*Times Film Corp. v. City of Chicago*, 355 U. S. 35, reversing 244 F. 2d 432 (C. A. 7, 1957); *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, reversing 249 F. 2d 114 (C. A. D. C., 1957); *One, Inc. v. Olesen*, 355 U. S. 371, reversing 241 F. 2d 772 (C. A. 9, 1957).) See also, *Mounce v. United States*, 355 U. S. 180, reversing upon confession of error, 247 F. 2d 148 (C. A. 9, 1957). That a sex relationship is portrayed which is "contrary to the moral standards, the religious precepts, and the legal code of its citizenry" (*Kingsley Int. Pic. Corp. v. Regents*, 79 S. Ct. 1362, 1365) will not necessarily render the portrayal "obscene." It is not too much to say that for the honest bookseller, as well as his counsel, there is no more agonizing ap-

praisal today than the determination of whether a writing dealing with sex is "constitutionally protected speech."*

If, therefore, an honest bookseller who makes books and art possible is to be condemned to imprisonment without consideration of his good faith or the reasonable precautions he attempts to take, without regard to knowledge or intent, then clearly consequences are bound to follow which will diminish the flow of protected ideas. In the hierarchy of personages responsible for the dissemination of literature—authors, artists, publishers, producers,

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*The legal writers, following the *Roth-Alberts* decision, have expressed confusion and uncertainty concerning the scope of the decision, and doubt as to whether the standards there enunciated are sufficient to safeguard freedoms of speech and press. It appears to be difficult to determine whether or not the *Roth-Alberts* test is the same or different from the tests imposed by the state court in *Alberts* or the trial judge in *Roth*. Particularly questioned is a standard made dependent upon appeal to "prurient interest" which it is claimed appears too vague and indefinite to satisfy due process requirements, and also questioned is the measurement of the book by "community standards" and lack of any alleged "redeeming social value," which it is claimed appear to place dissenting views and new ideas at the mercy of a hostile majority or officials of government. Most writers are agreed that the *Roth-Alberts* decision was intended to make more definite the class of persons (panderer); type of conduct (scienter); and kind of writing (hard-core pornography) which the "obscenity" laws were alone intended to reach to avoid constitutional infirmity. *Note*, 11 Vand. L. Rev. 585 (1958); *Note*, 60 W. Va. L. Rev. 89 (1957); *Note*, De Paul L. Rev. 111, 113 (1957); *Note*, U. of Ill. L. Forum (1957) 409; *Note*, 7 Duke L. J. 116 (1958); Paul and Schwartz, *Obscenity in the Mails* in 106 Univ. of Pa. L. Rev. 214 (1957); Schwartz, *Portents from Recent Supreme Court decisions* in 29 Pa. B. A. Q. 8 (1957); *Comment*, Vill. L. Rev. 71 (1957); *Note*, 36 Texas L. Rev. 226 (1957). The Nebraska Supreme Court recently invalidated the state obscenity statute, holding that even the impress of the *Alberts-Roth* definition on the law would still render its provisions too indefinite and ambiguous under the State constitution. *State v. Nelson*, 168 Neb. 394, 95 N. W. 2d 678 (1959). See also, *Commonwealth v. Blumenstein*, opinion by Bok, J., holding the Pennsylvania obscenity law unconstitutionally vague, decided July 2, 1959, unreported.

booksellers—the proprietor of a bookshop is in the weakest position to defend the sanctity of a publication:

> "He cannot expect to make money from selling copies of single books to pay a fine or even his lawyer's bill for defending a criminal prosecution. If he is convicted, the fine will take a considerable share of the profits from his other books. Furthermore, a conviction will scare away reputable patrons for the future." (*Chafee, Free Speech in the United States* (1941), p. 537.)

The bookseller who knows that he has become the absolute guarantor of the sexual purity of all the books in his possession can either adopt the alternative of leaving a business fraught with such danger to his livelihood, liberty and reputation, or steer far wide of the danger zone to avoid not only official, but unofficial, censorship to whom an ordinance such as the one herein can become an awful weapon. (Chafee, *supra*, pp. 537, 538; Lockhart and McClure, *Literature, The Law of Obscenity*, and the Constitution in 38 Minn. L. Rev. 295, 302-320 (1957).) He may be forced to make informal arrangements with the police.* A bookseller may even be driven to accepting prior censorship as a lesser evil.

Moreover, the radiating influence of such fears and submissiveness by the bookseller flow back to the publisher

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*Lawrence Lipton, commenting on a State Assembly hearing into the field of obscenity, writes of the testimony of a Los Angeles police officer: "A vice squad officer whose name and face was barred by the committee from reporters and photographers got up on the stand to relate how he goes about the business of saving Los Angelenos from printed matter that, in his opinion, would put too great a strain on their moral character. He merely drops in from time to time at the offices of the book and magazine distributors, lets his eye rove over the covers, riffles through a few

and author, and a process of censorship sets in which can only have a deleterious effect upon freedom of expression. It can only result in a deterrence of speech and press which the Constitution protects. In operation and effect, the ordinance here produces a result which the municipality could not directly accomplish. That a municipality has the power to enact a "public welfare" statute should not mean that it can use this power to avoid constitutional prohibitions. (*Thornhill v. Alabama*, 310 U. S. 88, 101-102; *Staub v. City of Baxley*, 355 U. S. 313, 322-325.)

C. The Exclusion of Scienter and Intent From the Law, the Indiscriminate Lumping Together of the Innocent and the Guilty, the Knowing and Unknowing, and the Resultant Curtailment of Protected Speech Make the Ordinance Invalid Because Offensive to the Due Process Requirements of the Constitution.

In *Wieman v. Updegraff*, 344 U. S. 183, this Court struck down a measure involving alleged disloyal associations, when the statute as construed disregarded the fact "whether associations existed innocently or knowingly" (*supra*, at p. 191). Such a law, it was noted, could only "inhibit individual freedom of movement" and "stifle the flow of democratic expression and controversy at one of its chief sources" (*id*). In *Sweezy v. New Hampshire*, 354 U. S. 234, 248, this Court spoke of the inhibiting effect of

pages here and there, and, if he sees something that he thinks might be 'objectionable,' he shakes his head a bit doubtfully in the direction of the distributor or one of his clerks and presto! the book is promptly and magically withdrawn from distribution in the L. A. area. Just like that. No fuss; no muss, no legal bother! If he is in any serious doubt about it he picks up a few samples and takes them to the City Attorney for an opinion. He has even managed to get some of the publishers to submit material for an opinion by the vice squad and the City Attorney before printing the book or the magazine." *Monkeys, Movies and Assemblymen* in *Sex and Censorship*, Vol. 1, No. 2, p. 30.

a state sanction "in the flow of democratic expression and controversy" where the sanction was "drawn without regard to the presence or absence of guilty knowledge in those affected." In *Winters v. New York*, 333 U. S. 507, Mr. Justice Reed noted that "no intent or purpose" (p. 519) was required in the statute there held invalid, and that an "honest distributor" (p. 520) could not know when he might be held to have ignored the prohibitions of the statute. In *Screws v. United States*, 325 U. S. 91, this Court construed a statute to include a specific guilty intent in order to avoid a "serious" (p. 96) challenge to the constitutionality of the law. It was feared that an official would be made "a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee" (p. 97). In *Kovacs v. Cooper*, 336 U. S. 80, Mr. Justice Reed again stressed that *Winters* had been decided to protect "an honest distributor" (p. 80).

In the *Roth-Alberts* decision, the majority opinion (p. 487, n. 20) saw no significant difference between the meaning of obscenity "developed in the case law and the definition of the A. L. I. Model Penal Code, Section 207.10 (2)." But if there is anything which is clear in the report of the American Law Institute, it is that under its definition of "obscenity" *scienter* cannot be removed entirely from the offense. It suggests the possibility of presumptions favorable to the state which will shift burdens of proof to an accused, but it definitively rejects the notion of strict criminal liability in the field. See proposed Section 207.10 (2)(a)(e)(f); (4)(5)(6) and (7). Tentative Draft No. 6, 1927, pp. 1-4. See also, the comments in the same Draft, pp. 7, 8, 10: "The principal objective of Section 207.10 is to prevent commercial exploitation of this

psychosexual tension"; 11: ". . . our basic purpose [is] to reach the 'panderer' rather than the customer-victim." ". . . the prosecutor must show that defendant acted purposely, knowingly or recklessly . . . but presumptions of knowledge and purpose are established to facilitate prosecution"; 13, 14-16, 17-18: "Creation, procurement and possession are made criminal by subsection (5), but only if coupled with a purpose to disseminate unlawfully; the burden of proving that purpose is on the prosecutor, aided only by the presumptions established in subsections (5) and (7)"; 29-30, 39-43, 45-46, 49-53. ". . . a possibility of acquittal for honest ignorance should be preserved . . . We reject any 'conclusive' presumption of knowledge . . ."

In deciding *Roth-Alberts*, Mr. Justice Brennan, in the majority opinion, stated that the statutes there involved were not too ambiguous to define a criminal offense (pp. 491-492). Each of the cases cited to support this ruling, however, stressed the fact that the statute involved in each case was directed only at those with guilty knowledge or intent, or those who had failed to exercise good faith in avoiding violation of the statute. The laws were directed at those "who deliberately" go close to the area of proscribed conduct (*Boyce Motor Lines v. United States*, 342 U. S. 337, 340); to "a mind intent upon wilful evasion" (*United States v. Ragen*, 314 U. S. 513, 524); to "no one not in search of trouble" (*United States v. Wurzbach*, 280 U. S. 396, 399); to those who "knowingly violate its provisions", and no one is required "to act at their peril but only to exercise their judgment in good faith" (*Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 501);

to "encouragements" to actual breaches of the law (*Fox v. Washington*, 236 U. S. 273, 277).*

Moreover, Mr. Chief Justice Warren, stressed that the validity of the statutes involved in *Roth* and *Alberts* could only be sustained as applied to the "conduct" of the individuals in those cases—"the central issue" (p. 495). The State statute prohibited only "wilful and lewd" conduct and the federal statute had been construed as limited to matter "calculated" to corrupt and debauch. It was such "conduct" which, in the opinion of Mr. Chief Justice Warren, the State could constitutionally punish (p. 496). It is significant that the Solicitor-General in his brief in

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*In addition to all these decisions, there was the quotation from *Rosen v. United States*, 161 U. S. 29, in note 28 of Mr. Justice Brennan's opinion. The *Rosen* decision, of course, does not support the ordinance here. In that case, the Court insisted that the offense was not committed "if the person making the deposit was, at the time and in good faith, without knowledge, information, or notice of its contents" (p. 32). The *Rosen* decision does appear to suggest that if there is proof of knowledge of the contents of material, then a conclusive presumption arises that the accused knew the material was "obscene," although this is not entirely clear. The presumption that a person intends the possible consequences of his act is generally rebuttable. Wharton, *Criminal Evidence* (12th Ed., 1955), vol. 1, p. 244. In the instant case, there was not even knowledge of the contents.

Thus, *Rosen*, firstly, does not support an ordinance which makes a person the absolute guarantor of the books he possesses. *Rosen* also involved an owner and manager of a newspaper, not the proprietor of a bookshop. But more important, *Rosen* was decided in 1896. The Court upheld a Hicklin instruction (p. 43), now rejected by this Court. In view of the subsequent free speech and due process decisions by this Court, it is submitted that it cannot now be held constitutionally proper to create a "conclusive" presumption of knowledge of the nature of the material. Of course, the creation of rebuttable presumptions is another matter. See, in addition to the free speech and due process cases already discussed: *Adler v. Board of Education*, 342 U. S. 485, 495-496; *Tot v. United States*, 319 U. S. 463, 467-468; *Morissette v. United States*, 342 U. S. 246, 273-276; *Speiser v. Randall*, 357 U. S. 513, 525-526.

the *Roth* case emphasized this aspect of *scienter* in defending the constitutionality of the law. See 1 L. Ed. 2d 2200, 2202, 2203.

That the constitutional validity of the "obscenity" statutes in *Roth-Alberts* rested in part upon the expressed and implied understanding that the statutes were not intended to apply to honest distributors, but only to those who with knowledge of the contents and nature of the material deliberately crossed the line, seems generally understood. Thus, in the recent decision of *State v. Sul*, 146 Conn. 78, 147 A. 2d 78 (1958), the validity of the Connecticut obscenity statute was upheld by the State Supreme Court after the court read into the statute a requirement of *scienter* to avoid constitutional infirmity.

In *City of Cincinnati v. Walton*, 145 N. E. 2d 407 (Mun. Ct., Ohio, 1957), the court in discussing the constitutional requirements of a test of obscenity in the light of this Court's decision in *Roth-Alberts* (pp. 411-413), stated: "Requiring that to be obscene matter must be calculated to appeal to man's prurient interest will, I believe, keep the courts out of many of the pitfalls into which they have fallen in the past" (p. 412). See also, *Bennett v. State*, 311 S. W. 2d 826 (Texas).

In this connection, the recent decison of District Justice Flynn in *Attorney General v. Simpson*, reported in 93 Irish Law Times 33 (February 28, 1959), relying in part on this Court's decision in *Roth-Alberts*, stresses the requirement of *scienter*. In that case, the court refused to commit for trial an accused charged with showing for gain an indecent and obscene performance.* The Court, after making an extensive anlaysis of the English and Ameri-

*The play was "the Rose Tatoo" by Tennessee Williams.

can decisions (pp. 36-41), held that there must be evidence of the accused's intent by the performance to deprave and corrupt those viewing the performance. After analyzing the early English common law, the decisions in *Hicklin and R. v. Seeker and Warburg* (1954), 2 All E. R. 683 (decision by Mr. Justice Stable), the decisions by this Court in *Butler*, *Alberts* and *Kingsley*, and the Draft and Comments of the American Law Institute, the court concluded that the "conduct of the individual" was the principal issue (p. 40) and, finding no intent to corrupt or deprave (p. 44), held that "no jury would or ought to convict" (p. 44).

It is interesting to observe that the English Obscene Publications Bill, now nearing passage, has always included some element of intent or knowledge. The original draft measure punished any person if it was shown that he "intended to corrupt." This was subsequently changed to punish any person who knowingly distributed or offered for sale any material "which to his knowledge is obscene." (223 Law Times 190 (April, 1957).) The Report of the Select Committee suggested that booksellers should have the defense "that they have not examined the contents of a work and have no reasonable cause to suspect that the intended Act applied to it, the onus as regards the last point being on the defendant. The ground for this proposal is that it is unreasonable to expect that a bookseller or proprietor of a lending library should read from cover to cover all that he displays." (225 Law Times 212 (April, 1958).)

In view of all the aforesaid, it is submitted that the ordinance here which punishes solely the innocent possession of an "obscene" book by a bookseller in a place where books are sold permits conviction without due process of

law. The legislation, as construed and as applied is vague and loose, leaving "to those who have to apply it too wide a discretion for sweeping within its condemnation what is permissible expression as well as what society may permissibly prohibit." Mr. Justice Frankfurter in *Kingsley Int. Pic. Corp. v. Regents*, 79 S. Ct. 1362, 1368. And, "the ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society" (*supra*, at p. 1369).

D. The Ordinance, Which Unfairly Punishes the Honest Bookseller and Unduly Restricts Freedom of Communication, is Unreasonable, Arbitrary and Irrational.

Finally, the unreasonable, arbitrary and irrational nature of the ordinance should be noted. The object of the ordinance, as construed by the court below, is "to protect the public morals" [R. 11]; the means employed are to punish those proprietors who without "scienter" and "lewd intent" possess an "obscene" book. It is submitted that such means are not reasonably necessary for the accomplishment of the alleged object of the statute; that in fact the means employed are unduly oppressive upon individuals; arbitrarily interfere with a lawful business serving important societal interests; and impose unusual and unnecessary restrictions upon proprietors of such lawful establishments. The ordinance purports to have been enacted to protect the public morals, but the removal of all ingredients of knowledge or intent has no real or substantial relation to this object and is a palpable invasion of rights secured by the fundamental law.

1. The one person above all whom the municipality should seek to strengthen and protect is the bookseller. It is the bookseller who provides members of the public with

the indispensable means of informing themselves on all issues which require understanding. If the bookseller is not to keep for sale books which will "corrupt the public morals," clearly the municipality must encourage him to take all lawful means and precautions to avoid having such books in his store. Unless a bookseller can in good faith make an effort to see that what he possesses does not contain material that offends the law, the only sufferer will be the public and public morals. For if honest ignorance and good faith are excluded from consideration, a proprietor can either retire from his business or take "risks" in order to stay. Instead of encouraging booksellers to "protect public morals," this ordinance tends to drive them in the opposite direction.

2. The ordinance, as construed and applied, punishes only the innocent "possession" of an "obscene" book. It does not purport to deal with the broad-scale "commercial exploitation of the marked and shameful cravings for material with prurient effect" (*Roth v. United States*, 354 U. S. 476, 496); nor "pandering" or "dissemination" or "commerce in the obscene" (American Law Institute, *Model Penal Code*, Tent. Draft No. 6 (May 6, 1957), pp. 1, 13). Mere possession of a book is the opposite of "purveying" or "assaulting" the sensibilities of an unwilling listener or reader. The average adult goes to a book shop ordinarily to purchase what he has already decided to read, or to "browse." The means of self-protection by the public are readily at hand. The dangers to the morals of the community, therefore, under such circumstances are minimal compared to the intrusions which the law here makes into the protected areas of liberty and property. See, *Cantwell v. Connecticut*, 310 U. S. 296, 307-311. There is not the slightest indication in the ordinance of

any specific danger arising from the innocent possession of an "obscene" book in a bookstore, so that the judgment below does not come "encased in the armor wrought by prior legislative deliberation" (*Bridges v. California,* 314 U. S. 261).*

3. The existence of a *mens rea* "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." (*Dennis v. United States,* 341 U. S. 494, 500.) Why then is the mere passive act of possessing an "obscene" book made an offense under the ordinance here without qualification, without consideration of honest ignorance or the taking of good faith precautions? The court below pointed to various decisions upholding statutes which have entirely different characteristics. Cases where the proceedings are criminal in form, but are really only a summary mode of enforcing a civil right are not in point, it is submitted. Neither are statutes for the protection of the revenue, or proceedings to abate a public nuisance, which, again, although criminal in form, are in substance in the nature of a civil proceeding.

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*The California Supreme Court has recently declared unconstitutional a county ordinance prohibiting the sale or distribution of "crime comic books" to any child under the age of 18. *Katzev v. County of Los Angeles,* 52 A. C. 372, ... P. 2d ..... (June 24, 1959). The ordinance was held invalid (1) as an unjustifiable abridgment of free speech. The record in the case failed to show, as the legislators allegedly found, any "close, causal connection between the substantive evil—juvenile delinquency and the circulation of crime comic books in general" (p. 379); (2) as too broad in encompassing all fictional, nonreligious accounts of crime (p. 380). "The distributors of such comic books will be forced either to stop selling all comic books or to read every page of every title they sell" (p. 380); (3) as a denial of equal protection of the law creating arbitrary exceptions; (4) and as failing to establish a clearly defined standard of guilt (pp. 382-384).

The object of pure food and drug laws is to protect purchasers and to conserve the public health. If a proprietor sells adulterated food or narcotics, then whether he is aware of the characteristics of the goods or not, the purchaser is in fact defrauded and the public health endangered. The tradesman is civilly liable, even if innocent, and all that the state is doing is giving penal consequences to what is already a civil wrong.

The purchaser of a book in a book store, or the "browser" is not an unwitting member of the public unable to protect himself. The average adult who purchases, or reads, a book in a bookshop is ordinarily more familiar with the contents and characteristics of the book than the proprietor. Whether a commodity is "tainted" or constitutes a "narcotic" is not a question on which either laymen or experts are likely to differ, but whether a writing is "obscene," or not, under the standards set by legislators, as construed and applied by the courts, requires resources which plainly are not available. See, *Alberts v. California*, 354 U. S. 476, 501-502; Ernst & Lindley, *The Censor Marches On* (1940), pp. 26-28; Chafee, *Free Speech in the United States* (1941), p. 531. The most that the law can reasonably expect from a proprietor of a book shop with respect to the possession of an "obscene" book is that he act with the utmost good faith and take reasonable precautions to avoid such possession.*

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*"Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience. A newspaper agent who received for distribution newspapers from all parts of the world would be responsible for the contents of every one of them." *King v. Ewart*, 25 N. Z. L. R. 709, 729.

Moreover, while the sale of a narcotic or adultereated food may be immoral in particular cases, the object of the pure food and drug laws is not to punish immorality, but to regulate trade and to protect the health of the public. The ostensible object of the ordinance here is not to regulate trade, nor to protect the public health, but to protect the public morals and to punish acts which are deemed highly immoral. It is a stigma not easily erased, to be convicted of possessing "smutty books" and sent to prison for such offense. It is simply unjust and arbitrary, therefore, to convict a morally innocent man of an offense which inherently can only be attributed to an immoral person.

4. It was stated by the court below that the ordinance was necessary because a proprietor could exculpate himself simply by swearing that he did not know the contents of what he was selling [R. 15]. This is somewhat akin to the argument of the prosecutors' that the ordinance is necessary because of "the difficulty of proof."

The short answer is that it will be for the trier of the facts to decide whether the accused is to be believed on the issue of knowledge and intent.

> "Of course we agree that the courts cannot 'ascertain the thought that has had no outward manifestation.' But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." (*American Communications Assn., C. I. O. v. Douds*, 339 U. S. 382, 411.)

The argument that a proprietor will simply falsify his intention, or be reckless with respect thereto, and there-

fore should not be permitted to testify on that score, smacks largely of ancient doctrines repudiated since at least the time of Lord Jeffrys. See, Wigmore, *Evidence* (3d Ed.), Sec. 581.

As to the argument of "difficulty of proof," this Court has indicated that even with respect to the creation of presumptions and shifting of the burden of proof, the "argument from convenience" is not enough to support legislation otherwise invalid. (*Tot v. United States*, 319 U. S. 463, 467-470.) In every criminal case, the defendant might well falsify his knowledge or intent, but it is doubtful that the state for such reason alone could validly eliminate requirements of *scienter* and *mens rea* from all criminal prosecutions ranging from homicide to larceny. (*Tot v. United States*, *supra*, at p. 469.) ". . . the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature . . ." (*supra*, at p. 467).

Moreover, universal experience rebuts the arguments relative to difficulty of proof or the possibilities of acquittals by feigning ignorance of the nature and character of the material. In England and Ireland, despite the alleged magnitude of the problem, we have shown that intent and knowledge constitute an essential ingredient of the offense. Connecticut has just held that "proof of knowledge that the proscribed material is obscene or indecent is requisite to a conviction" (*State v. Sul*, 146 Conn. 78, 147 A. 2d 686, 691). North Carolina has virtually enacted intact Section 207.10 of the American Law Institute's Model Penal Code. (North Carolina, *Session Laws*, 1957, C. 1227.) The Institute, of course, makes provision for proof of knowledge and intent, while shifting the burdens of proof. The 1955 Wisconsin Criminal

Code makes intent a requisite for criminal liability for obscenity. (Am. Law Inst., Mod. Pen. Code, Tent. Draft No. 6 (May 6, 1957), p. 49, n. 81.) Massachusetts requires proof that defendant was aware of the obscene character of the material in the case of books (*supra*, p. 49, n. 81). Louisiana has a requirement of intent (*supra*, p. 69). Colorado interdicts material "calculated to corrupt public morals" (*supra*, p. 62). The Solicitor General of the United States made no claim that federal prosecutions for "obscenity" were made "difficult" because of a requirement that the material be "calculated to corrupt and debauch the minds and morals of those to whom it was sent." (*Roth v. United States*, 354 U. S. 476, 494.)

How arbitrary and unreasonable the ordinance herein is in relation to its alleged objects can be seen from the situation in California itself. California has had a requirement of "lewd intent" for almost 100 years in its obscenity laws. See West's Calif. Pen. Law, Sec. 311, and historical note thereunder. See also, Calif. Pen. Code, Secs. 20 and 26, subdivs. 4 and 6. Judge Swain dissenting below [R. 16-18], stated that the law was "intended to give all proprietors of book stores throughout the State protection of the scienter rule" [R. 18]. In *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, where the validity of the state law was upheld, the court stated that the legislature may have believed that the evils to result from the alleged hampering of the prosecution "were less than those to be anticipated from the possibility that without the questioned words in the statute persons who were ignorant of the true character of a book might nevertheless be convicted of a crime for selling it" (p. 965). Plainly, the state statute with its requirements of intent were not a bar to conviction for obscenity in the City of Beverly Hills. (*Alberts v. California*, 354 U. S. 476.)

Moreover, the State of California has indicated an unwillingness to extend the range of "public welfare offenses." Thus, in *People v. Vogel*, 46 Cal. 2d 798, 299 P. 2d 850, where it was held that a defendant was not guilty of bigamy, if he had a reasonable and bona fide belief that facts existed which left him free to remarry, Judge Traynor noted that the "traffic and food and drug regulations" which "usually involve light penalties and no moral obloquy or damage to reputation" (p. 801, n. 1) are limited exceptions to the general rule requiring a union of act and wrongful intent (p. 801). Thus, California does not punish the innocent possession of narcotics or liquor, or a reasonable mistake in the filling of a prescription resulting in death. (*People v. Winston*, 46 Cal. 2d 151, 293 P. 2d 40; *People v. Stuart*, 47 Cal. 2d 167, 320 P. 2d 5; *Matter of Ahart*, 172 Cal. 762, 159 Pac. 160; *People v. Cole*, 113 Cal. App. 2d 253, 248 P. 2d 141; *People v. Condiotto*, 128 Cal. App. 2d 347, 275 P. 2d 500.)

If the State of California enforces its narcotic, liquor, manslaughter and bigamy laws without resort to the doctrine of absolute strict liability, it appears arbitrary and unreasonable for the municipality to assert that this ordinance, so dangerous to fundamental liberties, is necessary to protect the "public morals" and avoid "difficulties" in proof. If the suppression of "immoral books" are the aim of the municipality, statutes narrowly drawn and directed at this specific evil are apparently available. See, *Kingsley Books, Inc. v. Brown*, 354 U. S. 436. See also, Calif. Pen. Code, Secs. 312-314. If a criminal prosecution against a blameworthy person is desired, rules of evidence and shifting burdens of proof are available, again without casting the net so large as to affect innocent persons engaged in free speech and press activities.

The point is that the ordinance here, as construed and applied, while ostensibly aimed to protect public morals from conduct which allegedly corrupts such morals, may actually "be made the instrument of arbitrary suppression of free expression of views." (*Hague v. C. I. O.*, 307 U. S. 496, 516.)

II.

The Book "Sweeter Than Life" Is Constitutionally Protected Speech. The Judgment of the Courts Below That the Book Is Obscene Under the Ordinance Clearly Violates the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

Heretofore, the discussion has been centered on "the person." As we have endeavored to show, the conduct of the accused was excluded—invalidly, it is submitted—from consideration in the case. There remains then only consideration of "the book." In the Points which follow we show how all evidence, relative to customary acceptance of books comparable to the one herein and all evidence relative to the lack of prurient appeal of the book, offered by appellant, was excluded; we discuss also the improper application of the standards for testing "obscenity" employed by the courts below. The Point herein is devoted solely to the single proposition that the book involved is a constitutionally protected writing under the First and Fourteenth Amendments to the United States Constitution.

The book herein was taken into custody in a book shop. There was no unsolicited invasion of privacy here. The book itself was not placed on the shelves with any lewd intent. There is no proof in the record that this book has ever corrupted or depraved any person, nor that it has any

substantial tendency to do so. Nor is there any proof in the record that the predominant appeal of the book is to a prurient interest or that the book goes substantially beyond customary limits of candor in description of sex. The book has no pictures or illustrations.*

(a) Since the claim here is that the book expresses ideas free from governmental infringement, we note here the frame of reference under which the claim is made. This Court has stated that sex and obscenity are not synonymous, that the portrayal of sex "in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." (*Alberts v. California*, 354 U. S. 476, 487.) Sex, a great and mysterious motive force in human life, "is one of the vital problems of human interest and public concern" (*supra*, p. 487).

Moreover, this Court affirmed that the rights of free speech and free press are not confined to any field of human interest. (*Thomas v. Collins*, 323 U. S. 516, 531.) "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." (*Martin v. Struthers*, 318 U. S. 141, 143.) So it has been held that a function of free speech is to invite dispute; that indeed it may best serve its high purpose "when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." (*Terminiello v. City of Chicago*, 337 U. S. 1, 4.) Speech "may strike at prejudices and preconceptions and have profound unsettling effects

*There is a dust jacket with an innocuous drawing.

as it presses for acceptance of an idea" (*supra*, p. 4). Hence, the dissemination of views may not be suppressed because they are unpopular, annoying, or distasteful. *Murdock v. Pennsylvania*, 319 U. S. 105, 116; nor because the pleader resorts to exaggeration, vilification, or even false statement. (*Cantwell v. Connecticut*, 310 U. S. 296, 310.) The advocacy of ideas "contrary to the moral standards, the religious precepts, and the legal code" of the citizenry are protected by the Constitution, for the guarantee of the fundamental law "is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." (*Kingsley Int. Pic. Corp. v. Regents*, 79 S. Ct. 1362, 1365.) "We should, in short, be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death." (Holmes, J. in *Abrams v. United States*, 250 U. S. 616, 630.)

The aforesaid is the broad character of the right upon which appellant relies. The importance of that right to the security of the Nation need not be emphasized to this Court. The right of free speech and a free press in order to promote diversity of ideas is "one of the chief distinctions that sets us apart from totalitarian regimes." (*Terminiello v. City of Chicago*, 337 U. S. 1, 4.)*

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*"Upon these clear principles, democracy depends for its very life, for they are the great sources of knowledge and enlightenment. And knowledge—full, unfettered knowledge of its own heritage, of freedom's enemies, of the whole world of men and ideas—this knowledge is a free people's surest strength.

The converse is just as surely true. A democracy smugly disdainful of new ideas would be a sick democracy. A democracy chronically fearful of new ideas would be a dying democracy.

* * * * * * * * * * *

We recognize that this Court, by its decision in *Roth-Alberts* assumed to place a narrow limitation upon the exercise of this broad and essential right. The limitation, however, is to be measured by "only the slightest crack" (*supra,* at p. 488) in order to safeguard vital freedoms.

Whatever may be the view of the narrowly confined power of governments to suppress books (*Cf., Alberts v. California,* 354 U. S. 476, 492, n. 31 and p. 501), it is submitted that the book herein is clearly entitled to the protection of the Constitution. "Book burning" has as unpleasant connotations for Americans today as it had in previous decades, more so perhaps since on the contemporary world scene, the existence of a free press and free writers is one of our proudest boasts and one of our most effective weapons.*

As it is an ancient truth that freedom cannot be legislated into existence, so it is no less obvious that freedom cannot be censored into existence. And any who act as if freedom's defenses are to be found in suppression and suspicion and fear confess a doctrine that is alien to America." Letter of President Dwight D. Eisenhower to Annual Conference of American Library Association, June 24, 1953. American Library Association *Freedom of Book Selection* (1954), pp. 131-132.

*With all due deference, it should not be assumed that the "danger is perhaps not great" (*Roth-Alberts, supra,* p. 506) if one municipality decides that a book should not be read. National organizations, as well as "village tyrants" and ambitious politicians and police chiefs would place first on the *index librorium prohibiturum* a book which bears the imprimitur of disapproval from this Court. See, Larrabee, *Morality and Obscenity* in American Library Association, *Freedom of Book Selection* (1954), pp. 23-37; Lockhart & McClure, *Literature, The Law of Obscenity and The Constitution* in 38 Minn. L. Rev. 295, 316-320. The book herein would become a measuring rod for every book on sex and sex variance, and since neither in theme, appeal to prurient interest, nor in realistic detail does the book herein approach the thousands of written works dealing with various aspects of sex and sex relations, the possibility is opened for a plethora of local raids and separate bonfires. Not only the *Well of Loneliness* but *Ulysses* and *Decameron* and the *Kinsey* reports to the public would be endangered if the book herein were condemned.

(b) Sweeter Than Life is described by its author as "a work of fiction" and a product solely of the "author's imagination." The book is written in the occasional style of the "flashback" and "stream of consciousness" technique, now familiar to most readers of contemporary literature. See Humphrey, *Stream of Consciousness in The Modern Novel* (Univ. Cal. Press, Berkeley, 1958).

In a frontispiece to the book, the author states the thesis of the work: "Revenge is sweeter than life itself. So think fools." The quotation is accredited to Juvenal, Satires. The story describes the essential emptiness and futility of a life dedicated solely to revenge for fancied or real injuries. This, simply stated, is the moral or theme of the work. It is not a new idea, as the quotation from Juvenal attests, but the idea is surely one which bears repetition. See, *New Testament: Romans,* XII, 19, 20; Bacon, *Essays Of Revenge.*

When a daughter was born to Joe and Lucy Bardolph, the disappointment of the father was that the child was not a boy (p. 25). The father felt cheated by his wife, as if somehow the birth of a daughter was an affront to his "bull-like strength" (p. 26). The relationship between husband and wife from that point on disintegrated and the father soon thereafter drank himself into an early grave.

The child, Nym Bardolph, and her mother were left impoverished. Even her mother, embittered at the recollection of her treatment by her husband and the cause therefor, showed the child no affection (p. 27). It was at such a time, when the problem of even obtaining enough food to live had become acute, that Nym's mother accepted the office of county superintendent of schools

(she had been a school teacher at the time of her marriage) at the behest of some unscrupulous politicians and business men interested in obtaining profitable building contracts (pp. 27-33).

In permitting herself to enter into this corrupt agreement, Nym's mother herself became corrupted. She hated herself and she hated her daughter as well. If "Nym had been a son" (p. 34) the son could have supported his aging mother and not left her subject to the men she had been compelled to deal with.

"Nym never heard the last of it . . . If there was one thing she was going to make sure of, she swore, it was that this daughter who should have been a boy was going to be as hard and self-reliant as if she were indeed a boy . . . They both became almost like men themselves—tough, unyielding, masculine in their thinking" (p. 35).

Nym attended school, had almost nothing in common with the girls and instinctively disliked the boys, but she mingled with them and enjoyed beating them in their own games. It was not until her junior year in high school that Nym discovered her mother had become a Lesbian (pp. 36-38).

It was shortly after her graduation from high school, that a crisis arose in Nym's life. Her mother's sexual variance had been discovered by a man, Sean O'Sullivan; his price of silence, Nym's hand in marriage (pp. 69-72). Nym decided to accept.

> "She also sensed an opportunity through Sean to organize her life in such a way that, meeting men on their own level, she could gradually work her hatred, her vindictiveness, her fierce sense of competition with them into a culmination of the type which she devoutly wished for" (pp. 72-73).

Thus, she married Sean, twenty years her senior (p. 70). But her consent to marry was conditioned upon her becoming a full partner in his profitable real estate business (p. 73). In the years which followed, it became evident to her husband that he could not expect the return of the love which he felt for Nym (pp. 75-78). When he had virtually become accustomed to this relationship, it was Nym who softened her attitude and resumed the relationship, only because she needed him to accomplish a sharp business deal (pp. 78-79).

Nym had persuaded her husband to remove from the office of the Register of Deeds a deed to a right of way made out to the city some fifty years ago (pp. 42-43). It covered an area where a tremendous expansion had been voted by the city fathers under the correct assumption that the area belonged to the city. An abutting area, however, belonged to Nym. Nym proposed to her husband that the deeds be altered so that the right of way appear to be her property, and the city compelled to purchase from her. No one at the Register's office had paid much attention to the ancient document, nor had the city officials (pp. 41-45).

The husband could take no more. Realizing that he had been duped, and unable to persuade Nym to let him return the deed, he left her forever—"left the business, left their home, left town" (p. 41).

The desertion by her husband left Nym with swirling emotions. On the one hand, the final control of the business was her triumph; yet doubts and fears assailed her. Feelings of affection for the man she had lived with for eight years mixed with hatred for all men and the desire to best them. Alone in the office with her female secretary, emotions stirred which she had suppressed as long as she

had been married (p. 21). Now, however, she was free and as her latent desires came to the fore, she found herself unable to resist making advances to her secretary and overcoming her will (pp. 21-25). But, this interlude had not done her any good, she "regretted bitterly what she had done to the young girl" (p. 40), and "regretted even more what she had done to herself" (p. 40).

In her bitterness at the loss of her husband and the reversion to feelings which she had long suppressed, Nym pictured herself as a "loveless monster of revenge" (p. 47). Her revenge seemed empty now, but she decided to go on with it. Nym falsified the deeds (pp. 47-51). To get the deeds back unnoticed, she seduces a man, Johnny Martel, who had always loved her (pp. 83-92, 96-106), and for her sake returns the deeds to the Register's office. But others had watched and discovered what was going on (pp. 57-65, 112-115), and finally they demanded that she sell the property to them (p. 161). Nym refused, and this despite the brutal treatment which she received at their hands (pp. 161-167).

Nym had finally reached the apex of her hatred for men. She now had no hesitancy in telling John Martel that she had used him (pp. 176-177); was indifferent to the advances of the secretary she had corrupted (pp. 106-110), and gloried in the bruises she had sustained to protect her business. As she strode to a country club to join a celebration going on, and which Nym felt in part was her own celebration, a bullet from a gun fired by John Martel brought her life to a close (p. 14).

Ironically, her husband, Sean, regained all the property Nym had taken from him. "But one piece of property—eighteen acres to the north of town, including a most crucial fifty feet—he gave to the city, and such was the

city's gratitude that the development they eventually put up, part of which was on the old Bardolph land, they called Bardolph Village in memory of the unfortunate young woman who unjustly met her death by an assassin's bullet" (p. 180).

(c) Clearly, the printed words in this book communicate "ideas", however one may chose to define this elusive term. The idea that homosexuality in persons is not necessarily inherited but rather the outgrowth of mistaken attitudes on the part of parents, or of an unwholesome home life is an important idea. That sexual variants suffer subjectively with ambivalent feelings of remorse and exultation are important aspects of knowledge for the physician and the social worker; that they find difficulty in coping with their external lives should be understood by parents and officials alike. That a person so situated cannot solve the problem by simply carrying on a vendetta against society, or resorting to acts outside of the law, is a message which one would hope every such person would take to heart. Since these are ideas dealing with matters of public concern it would appear, it is respectfully submitted, that they should have the protection of the Constitution. *Thornhill v. Alabama,* 310 U. S. 88, 101-102.

Moreover, if more be needed, it is submitted that these are ideas of "redeeming social importance". While this phrase, it is respectfully submitted, if taken literally, would appear to require that each idea prove it is "going to last" and be of some lasting "value to society" in order to obtain First Amendment protection,* it is probable that

*It is difficult to tell the "value" of an idea; sometimes the trite notion expressed by a student in an English composition may be the instructor's Ph. D. thesis. Whether new ideas will always

the words are intended to have the more limited meaning set forth by Mr. Justice Murphy in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571 as adopted from the language of Professor Chafee in his treatise, *Freedom of Speech in the United States* (1941), p. 150. See, *Alberts v. California*, 354 U. S. 476, 484-485. It should be noted that both of these great libertarians were referring to "profanity and indecent talk and pictures . . . Words of this type offer little opportunity for the usual process of counter-argument. The harm is done as soon as they are communicated, or is liable to follow immediately in the form of retaliatory violence." Chafee, *supra*, p. 150. It was this type of utterance, likely to create a breach of the peace, to which he referred when he spoke of utterances which have "a very slight social value as a step toward truth" (*supra*, p. 150).

It would not do honor to either Professor Chafee or Mr. Justice Murphy, it is respectfully submitted, to suppose that they would support the action of the municipality here. As Professor Chafee stated: "Thus all these crimes of injurious words must be kept within very narrow limits if they are not to give excessive opportunities for outlawing heterodox ideas" (*supra*, p. 152).

We respectfully submit, making due allowance for the delicate and sensitive nature of the constitutional judgment which must be made, with knowledge that the task is onerous and exacting, that the book herein must be permitted to exist. For "the First Amendment's basic guarantee is that of freedom to advocate ideas" (*Kingsley Int. Pic. Corp. v. Regents*, 795 Ct. 1362, 1365), and

last is problematical, but the ideas of one day may father the idea of a century. As to ideas being of "value to society"; society often "values" only what it understands. That is why the idea of a "round world" took so long to be accepted.

"where the First Amendment applies, it is a denial of all governmental power in our Federal System." *Marsh v. Alabama*, 326 U. S. 501, 511.

(d) The case below was treated as if the decision of this Court in *Roth-Alberts* had marked all literature dealing with sex variance as "obscene". But the argument of the Solicitor General in *Roth-Alberts*, the various opinions of the Justices in that case, and the later decisions of this Court in *Times Film Corp., Sunshine Book Co., One, Inc., Mounce* and *Kingsley Int. Pic. Corp.* would all appear to indicate a far more limited view—that only "hard core pornography" was to be interdicted, if the "obscenity" laws were not to become unconstitutionally broad. Roughly 90% of the material intended to be covered by the "obscenity" laws, the Solicitor General stated, was material "manufactured clandestinely, mostly objects, pictures and films" of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. *Roth v. United States, Brief for the United States*, p. 37. The "border line" category of 10% consisted "primarily of photographs" (*supra*, p. 37). Indeed, the Solicitor General urged that the validity of the "obscenity" statute "must be judged by this mass of 'hard core' pornography" which allegedly was the "main objective" of the statute (*supra*, p. 34).

The book herein, it is respectfully submitted, is far removed from this limited area to which the Solicitor General referred, and to which the *Roth-Alberts* decision was apparently directed. Lesbianism is a fact of life, well known to the scientist as well as the novelist. Dr. Caprio states in his treatise, *Variations in Sexual Behavior* (Citadel Press, 1955), that "female homosexuality is as old as the human race. It constitutes a problem of uni-

versal significance. It has existed in every period of civilization among every people" (p. 163). Dr. George W. Henry, in a preface to Foster, J. H., *Sex Variant Women in Literature, A Historical and Quantitative Survey* (Vantage Press, N. Y., 1956), states: "Sexual romance shows itself in so many different ways that all types of imaginative writings have to be studied if we are to understand human motivations and behavior." It is estimated that the number of potential homosexuals in the United States is in the neighborhood of 8,000,000 or higher. McPartland, *Sex in Our Changing World* (Berkely Pub. Corp., N. Y., 1958), p. 137.

The subject has been the concern of the physical and social scientists, of course. But it should be noted that the clinical case histories and the realistic details in all these works are now made available to the general public, sometimes in paper back covers. See, Robertiello, *Voyage from Lesbos* (Citadel Press, N. Y., 1959); Kinsey, *Sexual Behavior in the Human Female* (Phila., 1953); Ellis, Havelock, *Psychology of Sex* (New American Library, 1954); Stekel, *Bi-Sexual Love* (1933); Bloch, I., *Anthropological Studies in the Strange Sexual Practices of All Races in All Ages* (N. Y., 1933); Hirschfeld, M., *Sexual Pathology* (1932); Krafft-Ebing, R. von, *Psychopathia Sexualis* (12 ed., N.Y., 1941). The reason for making this information available was importantly expressed in the Kinsey report aforesaid, under the heading "The Individual's Right to Know" (pp. 10-11).

> "The scientist who investigates sexual behavior seems under special obligation to make his findings available to the maximum number of persons, for there are few aspects of human biology with which more persons are more often concerned. Most men

> and women and adolescent children, and even pre-adolescent children in their youngest years face, at times, problems which some greater knowledge of sex would help solve. As in other areas of science, the restriction of sexual knowledge, to a limited number of professionally trained persons, to physicians, to priests, or to those who can read Latin, has not sufficiently served the millions of boys and girls, men and women who need such knowledge to guide them in their everyday affairs" (*supra*, p. 11).

But if scientific study has value to the average person (and millions of the Kinsey reports and other studies have been purchased), the novel perhaps has even more to offer, to inform, to educate, than the scientific work. The novel furnishes insights for individuals which even scientific writings cannot provide. Here one can learn, perhaps for the first time, that other persons have the "same inferiority complex, the same vices, the same temptations", *Writers at Work*, edited by Malcolm Cowley (N. Y., 1958), p. 147. The novelist is not strictly oriented to any professional school of thought. His interpretation of life is not constrained to the limits of statement or expression imposed upon a lawyer, clergyman, physician, biologist or sociologist. His task is to mirror life, and more often in his imagination and fantasy, to reveal more of himself than even he suspects. All of this is of tremendous value to the average person to whom the novel is often the key to the universe. Imaginative as well as scientific writing is a mirror of human sexual behavior which must be given serious attention.

Dr. Jeannette H. Foster, for many years a librarian of Kinsey Institute, in her recent *Survey of Sex Variant Women in Literature* (N. Y., 1956) makes this very

point. In a bibliography (pp. 362-395), the titles of 324 literary works involving sexually variant women are included; also 218 bibliographical, historical and critical material; and 304 scientific and psychiatric writings. In her conclusions, after an extensive survey of the literature, the author points out that these novels help to clarify, sometimes contradict, scientific notions or mere prejudices. Thus, "the majority of variant or Lesbian women observed by the writing fraternity are not masculine in physique" (p. 343). "There are masterful spirits who need to prove themselves the equal of any man, or to dominate rather than follow. These are rebels and lone wolves who defy authority or public opinion and are usually jealously possessive of the few they love. There are the more detached egoists and narcissists who see others only in terms of their own advantage and abandon themselves to no one. There are the shy and clinging who crave protection" (p. 343). The "negative reaction to men", "troubled family relations", "the mother found wanting", "the witnessing of intercourse at an early age" (pp. 344-345); or the external circumstances such as "institutions" restricted to one sex, reform schools, military barracks, etc. (pp. 346-347)—all of these causal factors appear in the literature of the sex variant.

Here, it is submitted, is "value" in the best sense of the word, ideas which can bring persons closer to the truth, to a better understanding of themselves and others. A perceptive student writes: "What has happened is this: when personality is examined as closely and candidly as it has been in the twentieth century novel—in and out of the stream of consciousness—it appears as an individual and not as a 'norm'. And if we have not been convinced in this century that everyone is abnormal, that the so-called neurotic condition is the general condition, we have learned

nothing essential about ourselves at all. The stream of consciousness novel has given us empirical evidence for this truth" Humphrey, *Stream of Consciousness in the Modern Novel* (Univ. of Calif. Press, Berkeley, 1958), p. 119.*

So too, Ann Aldrich, who wrote a book called *"We Walk Alone* in 1955, "a study of the Lesbian, by a Lesbian", states in a Foreword to her newest book, *"We, Too, Must Love* (Fawcett Pub, 1958) that after the publication of the first work, she received "hundreds of letters". They were from doctors, from mothers and fathers of Lesbians, from girls who weren't sure they were, and from those who knew they were. Few were frivolous; most were from serious people who wanted "to know more about the female homosexual". In the foreword, the author quotes from one of these letters which reads in part:

> "When I read the chapter on how a Lesbian becomes what she is, things began to come back to me —little things about how I was as a kid. I began to see myself more clearly. I used to think I didn't want to put myself under a microscope and see my real nature, but, Miss Aldrich, thank God I did. I think sometimes we are too self-pitying, too ready to blame society for our personalities, and not very often willing to admit our faults.
>
> "I'm glad you didn't try to whitewash us—try to say we're perfectly normal. I'm glad you pointed out we bring a lot of trouble on ourselves."

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*It is, of course, fairly well known that psychiatrists and sociologists have gotten clues from writers as to certain forms of sexual deviations because they were described so accurately by writers who had insight into the human mind. Thus, the two most popular words describing opposite deviations, "sadism" and "masochism" are derived from the writings of Marquis De Sade and Leopold von Sacher-Masoch. Bloch, *Marquis De Sade, His Life and Works* (Brittany Press Inc., 1931).

The novel reveals the actualities of life, and this revelation brings better understanding. It is a fallacy to say that the average person acquires the human frailities about which he reads. On the contrary, it is more accurate to say that the novel has taught the average reader more morality and moral values than any other institution.

(e) The predominant appeal of the book Sweeter Than Life is not to a prurient interest, nor does it go substantially beyond customary limits of candor in description of sex.

The drastic change in our society concerning the literary treatment of sex is symbolized, we submit, by the acceptance by society and the law of Lawrence's unexpurgated "*Lady Chatterley's Lover,*"* which Judge Byran stated "does not exceed the outer limits of the tolerance which the community as a whole gives to writing about sex". (*Grove Press and Readers Subscription, Inc. v. Christianberry*, U. S. District Court, So. District of N. Y., No. 147-187 (unreported).)

Discussing "contemporary community standards", Judge Bryan said:

> ". . . the broadening of freedom of expression and of the frankness with which sex and sex relations are dealt with at the present time require no discussion. In one best selling novel after another frank descriptions of the sex act and 'four-letter' words appear with frequency. These trends appear in all media of public expression, in the kind of language used and the subjects discussed in polite society, in

*The Best Seller List of the New York Times Literary Section for August 9, 1959 contained *Lady Chatterley's Lover* by D. H. Lawrence and *Lolita* by Nabakov. The latter book has been on the Best Seller List for 50 weeks.

pictures, advertisements and dress, and in other ways familiar to all. Much of what is now accepted would have shocked the community to the core a generation ago. Today such things are generally tolerated whether we approve or not."

Ben Hecht, the author of *The Sensualists*, is quoted in an advertisement in the Los Angeles Times for May 17, 1959, as follows:

"Sex, at least in fiction today is a clinical matter, requiring the attendance of the author with a kit of scalpels and divining rods. It is no longer Venus and Adonis who play the double buttocked game (as Rabelais called it) but all manner of neuroses engage in the sport, including incest, homosexuality, sexual impotence, infantilism, fetishism and cannibalism. However our new fevered poking around into the mysteries of nature has uncovered not a tittle of information on the ancient phenomenon of sex fusion. You have only to read Ovid, Rabelais, Aretino, etc. to realize the past was much ahead of us in its sexual insights. It is with the hope of catching up a modest inch or two with our more amorously erudite forefathers that I have written The Sensualists. It is a sort of seminar on modern eroticism, such as Ovid might have set down had he been cross-pollinated by Raymond Chandler."

The important break from Victorianism in literature appears to have started in England in 1913 with the publication of D. H. Lawrence's *Sons and Lovers*. This was followed by Joyce's *Ulysses*, in 1930 containing the once highly controversial Molly Bloom soliloquy. In America it was Hemingway's *The Sun Also Rises*, appearing in 1926, which started the new trend. In 1935, Hemingway's *To*

Have and Have Not brought the idiom of language as it is actually spoken, the four-letter words and the descriptions of the sex act, into the modern literature. Mr. Hemingway is, of course, a Nobel prize winner.

Another American Nobel prize winner is William Faulkner. His first major work, *The Sound and the Fury*, was published in 1929. Experimental in technique, the book dealt quite frankly with the incestuous attraction of brother and sister. Mr. Faulkner continued to move further in the direction of candor in theme and description in *Sanctuary* published in 1930 and *Wild Palms* published in the same year.

The national Book award recipient for 1951 was *From Here to Eternity* by James Jones. The book was preceded by about three years by Norman Mailer's *The Naked and the Dead*. Both authors made very heavy use of the idiom of the soldiers in peacetime armies as well as in war. These involved very frequent and lurid use of four-letter Anglo-Saxon words and direct description of sex relations on a number of occasions. Both books were highly praised by all the critics and received major awards.

John O'Hara received the National Book award in 1956 for *10 North Frederick*. The book was a popular best seller. It contained direct use and discussion of sexual relations, used four-letter words quite often, and had sequences dealing with Lesbianism. Thomas Mann's *Death in Venice* and *Blood of the Walsungs*, when translated, brought to the public themes of homosexual and incestuous attractions. *Peyton Place* by Grace Metalious [R. 86-88] is prolific in its use of colloquialisms, and descriptions of the sex act. Homosexuality and incest are explored. Although it probably has not the literary merit of the other works mentioned above, it was probably the

most widely read book in the United States in the last five years.

It should be noted also that many of these books, first appearing in hardcovers, later were reprinted in paper backs and then transposed to the motion picture screen. It should also be noted that the books have come from such conservative publishers as Reinhard, Random House, Scribner, Houghton-Miflin, etc.

It is fair to say that there is no aspect of sex or sex relations which has not been dealt with candidly and openly in the literature of the twentieth century. Experimentation in technique and style like *Ulysses* has become standard. The dynamic process of our inner life has become objectified in art. There are virtually no taboos in subject matter. To a large extent the "moral statement" of the author has been replaced by the "slice of life" which leaves to the reader the moral lessons to be drawn.

The book Sweeter Than Life is a novel. It has a beginning, a middle and an end. It is structured. It involves characters in a setting. It has a plot; the characters are dimensional in conflict, and believable. The sexual scenes are integrated with the story and relevant thereto. The moral tone of the book is disapproving; it emphasizes retribution for the vengeful, no matter how harshly nature or society has dealt with them. Not a single Anglo-Saxon four-letter word appears in the book. If the writing is unpolished, so are a great deal of other writings which enjoy constitutional protection. Our whole literature is built on the hackneyed writings of the past. Nor is the book lacking in psychological validity. Dr. George Henry's *Sex Variants: A Study of Homosexual Patterns* (N. Y., 1948), lists in his case studies such factors as the desire of the parents "to have a boy", quarreling and lack

of affection between the parents"; "contemptuous of men but willing to be an old man's darling"; "intense feeling of rivalry with men" and other like factors as the usual causes for homosexuality in women (pp. 549-557).

If the book Sweeter Than Life is placed next to the contemporary novels which enjoy honors and awards, as well as wide acceptance, it is submitted that the book herein will appear pallid in theme, description, clinical detail or use of language. It is plain from a perusal of the contemporary scene that there is a broad acceptance of discussion of virtually all sex themes; that there is a frankness and candor in discussion of these themes which the book herein involved does not even attempt. An incomplete list of books frankly portraying sexual themes generally in all their manifestations would include: Hecht, *The Sensualists;* Lawrence, *Lady Chatterley's Lover;* Lawrence, *Sons and Lovers;* Joyce, *Ulysses;* Hemingway, *To Have and to Have Not;* Hemingway, *The Sun Also Rises;* Faulkner, *Sanctuary;* Faulkner, *Wild Palms;* Caldwell, *God's Little Acre;* Jones, *From Here to Eternity;* Mailer, *The Naked and the Dead;* Mailer, *Barbary Shore;* Mailer, *Deer Park;* O'Hara, *10 North Frederick;* O'Hara, *Butterfield 8;* O'Hara, *From the Terrace;* Metalious, *Peyton Place;* Warren, *All The Kings Men;* Cain, *The Postman Always Rings Twice;* Dahl, *The City and the Pillar;* Nabakov, *Lolita;* Oleck, *Messalina.*

The incest theme is emphasized in: Mittelholzer, *Children of Kaywana;* Nabakov, *Lolita;* Onstott, *Mandingo;* Metalious, *Peyton Place;* Cain, *Butterfly;* Prokosch, *Tale by Midnight;* Wolff, *Whistle Stop;* Mann, *Blood of the Walsungs;* Mann, *The Holy Sinner;* d'Stefani, *Black Grapes;* Ford, *'Tis A Pity She's a Whore;* Ellison, *The Invisible Man;* Eliot, *Proud Youth;* Evans, *Shadows Fly-*

ing; Clippinger, *Cassandra;* Bellamin, *Kings Row;* Burns, *Lucifer with a Book;* Faulkner; *Sound and the Fury;* Van Koski, *A Glass Rose.*

Lesbianism and Homosexuality are the principle themes of: Courage, *A Way of Love;* Aldrich, *We Walk Alone;* Taylor, *Whisper Their Love;* Teller, *Twilight Men;* Morgan, *The Price of Salt;* Casco, *Only a Women;* Packer, *Spring Fire;* Aldrich, *We, Too, Must Love;* Wilhelm, *We Too Are Drifting;* Mark, *My Sister, My Beloved;* Donisthorpe, *Loveliest of Friends;* Whittington, *Fires That Destroy;* Packer, *The Evil Friendship;* Salem, *Chris;* Paula Christian, *Edge of Twilight;* Bodin, *The Sign of Eros;* Barrow, *I am a Woman;* Anna Weinraciek, *Of Love Forbidden;* Bodin, *All Women's Flesh;* Syun, *The Mountain is Young;* Coleman, *Sam.*

Books dealing with sex and sex variants which have been made into motion pictures would include: *Cat On a Hot Tin Roof; Tea and Sympathy; 10 North Frederick; Peyton Place; Farewell to Arms; Kitty Foyle; Mr. Roberts; Bus Stop; Raintree County; No Down Payment; The World of Susie Wong; Baby Doll; Bonjour Tristesse; A Certain Smile; Duel in the Sun; Forever Amber; Young Lions; From Here to Eternity; The Naked and the Dead; God's Little Acre; Tunnel of Love; Raze Wind in Eden; Shore Leave; The Barbarian and the Geisha; The Revolt of Mamie Stover; Some Came Running.*

It is submitted, therefore, for all the above reasons that the book herein enjoys the protection of the Constitution. The principles at stake far transcend the importance of the book, but in our ability to read this very book tomorrow lies the test of these principles.

III.

The Denial by the Courts Below of All Opportunity to Prove by Competent Evidence That the Book Involved Herein Was Not Obscene, Violates the Free Speech Provisions of the First and Fourteenth Amendments and Arbitrarily and Discriminatorily Deprives Appellant of a Fair Trial and His Liberty and Property Without Due Process of Law in Violation of the Applicable Provisions of the Fourteenth Amendment.

The appellant offered as witnesses in his behalf the testimony of Robert R. Kirsch, the book review critic of the Los Angeles Times, a newspaper of general circulation in the City of Los Angeles, and the testimony of Dr. Zoltan Gross, a clinical psychologist, with offices located in the City of Beverly Hills, State of California [R. 43-74]* The abundant qualifications of the aforesaid witnesses were undisputedly established [R. 43-47, 56-68].

Based upon his described education, training, teaching, experience and work, the witness Kirsch expressed himself as familiar with contemporary community literary standards [R. 46-47]. When asked to state what these standards were [R. 46], the trial court sustained an ob-

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*Prior to the trial herein, there had been another trial of another accused before the same trial judge, and a jury, involving the said Sections 41.01 and 41.01.1 of the Los Angeles Municipal Code. The aforesaid witnesses, Kirsch and Gross, were called and qualified but their testimony was rejected [R. 46, 51, 67, 73]. Offers of proof were made [R. 52-55, 73-74] and also rejected. Immediately thereafter, the case herein was tried before the same trial judge without a jury and with the same counsel. It was stipulated herein that if the same witnesses had been called, their testimony with respect to the book herein would be similar, and would again be rejected, as would the offers of proof [R. 42-43].

jection by the prosecutor [R. 46-52]. It seemed to the trial judge that "persons of very limited knowledge and understanding would not have to have an expert tell them something they have read is a very bad thing to read and what effect this thing would have upon them" [R. 47]. The "intent of this ordinance", according to the trial judge, was to protect "groups of the people who might not use good judgment and prudence in what they read" [R. 47], and the testimony of the witness as to contemporary community standards was therefore irrelevant and inadmissible. See also, R. 86-90.

The appellant offered to prove by the witness that the book was within commonly accepted community standards; that the book had literary merit and served a useful social purpose; that in the past decade, the community standards had changed to reflect a broader and more tolerant discussion of sex matters; that the witness had with him a number of literary works currently being sold extensively throughout the country and described as "best sellers" which were comparable in depiction and representation to the book herein, from all of which the witness concluded that the work herein involved does not appeal to the prurient interests of the average person, applying contemporary community standards [R. 52-54].

Dr. Gross, following the description of his educational background, his experience and training [R. 46-67] was not permitted to testify as to whether the scientific methods he used as a psychologist would shed light on whether a particular book was within or without community standards [R. 67], its effect on average people [R. 72], nor his opinion concerning contemporary community standards relative to sexual behavior [R. 73]. The appellant offered to prove that the witness would testify that he was fa-

miliar with present day community standards regarding sexual behavior and sexual expression; that the work involved did not go beyond such standards; that there was no way of stating with certainty whether the material would have a substantial tendency to corrupt and deprave its readers by arousing lascivious thoughts or lustful desires; but that within the bounds of reasonable psychological certainty, the work did not fall into the category of being able to corrupt or deprave its readers [R. 73-74].

In rejecting the testimony and offer of proof, the trial judge held that it was for the trier of the facts as a reasonably prudent person to render all the aforesaid opinions of the book; that a scientific opinion different from the conclusion which a jury might reach was irrelevant and immaterial [R. 68-72]. The Appellate Department below, concurred in these views [R. 11-12].

As the aforesaid discussion makes clear, all evidence offered by appellant to show that the book does not go beyond customary limits of candor in description of sex was rejected by the courts below. All evidence offered by appellant to show that the predominant appeal of the book is not to the prurient interest of the average person, that the material has artistic, literary and scientific ideas was also rejected. Thus, adopting *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853 [R. 11], the court below held that in judging the "obscenity" of a book it was immaterial that "other bookdealers were selling it", or "the public libraries had copies of it" or "because other books equally bad were being openly sold" (*supra*, p. 856). The fundamental assumption of the courts below was that the "trier of the fact" [R. 11] was already equipped to decide the issue of "obscenity" merely by reading the book.

The particular circumstances in which the evidence was rejected should be noted. The ordinance was first construed as imposing strict criminal liability upon appellant. Therefore, the prosecution put in no evidence on the issues of knowledge and intent and appellant's uncontradicted testimony of lack of knowledge and intent was disregarded. All that remained for trial was the issue of the "obscenity" of the book. The prosecution put in no evidence on this issue. The appellant offered evidence on the issue, but it was rejected by the courts below because allegedly the "obscenity" ordinance, as construed and applied, left determination of this crucial issue solely to the "trier of the fact" unencumbered by the testimony of witnesses. Thus, the trier of the "fact" found the book "obscene", without permitting the presentation of a single fact upon which to base his judgment.* How the trier of the fact reached his conclusions, without the aid of evidence, can be gleaned from the record [R. 75-91]. Sitting like a "physician" [R. 83] treating a "disease", the trial court read the book "three times" at home [R. 91], found himself "depressed, very depressed" [R. 82]—and prescribed thirty days imprisonment for the bookseller, not shown to have read the book nor been aware of its depressing character.

It is submitted that such application and construction of the ordinance abridges free speech and press and depriyes accused in a criminal trial of his liberty without due process of law.

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*In holding that criminal prosecutions as well as injunctive proceedings are available to a state "to protect its people against the dissemination of pornography," this Court added: "with due regard, of course, to appropriate opportunity for the trial of the underlying issue" (*Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 441).

When this Court rejected the *Hicklin* test as "unconstitutionally restrictive", the Court summarized the later decisions as having substituted a valid test: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Alberts v. California*, 354 U. S. 476, 489. It was held that such standard "provides safeguards adequate to withstand the charge of constitutional infirmity" (*id.*). This Court also held that the aforesaid standard was sufficiently followed in a construction of the law which held that a book is "obscene" if, taken as a whole, it has "a substantial tendency to deprave or corrupt" the normal person (p. 490) "by inciting lascivious thoughts or arousing lustful desire" (p. 480). Moreover, this Court stated that there was no significant difference between the meaning of obscenity thus developed in the case law and the definition of the American Law Institute: "A thing is obscene if, considered as whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters" (p. 487, n. 20).

There is, of course, no doubt that the tests formulated by the American Law Institute were "designed to assure reception" (Tentative Draft No. 6, p. 44) of evidence bearing on the issue of obscenity. Section 207.10(2) reads in part:

> "In any prosecution for an offense under this section evidence shall be admissible to show:
>
> "(a) the character of the audience for which the material was designed or to which it was directed;
>
> "(b) what the predominant appeal of the material would be for ordinary adults or a special audience,

and what effect, if any, it would probably have on behavior of such people;

"(c) artistic, literary, scientific, educational or other merits of the material;

"(d) the degree of public acceptance of the material in this country;

"(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; . . ."

See also Comments, pp. 10, 11, 29-31, 36-39, 39-43, 43-46, 46-49. The Institute states that under its definition of obscenity "a court could not instruct that a given writing is obscene as a matter of law, since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression" (p. 47).

In the course of the proceedings of the 34th Annual Meeting of the American Law Institute which gave birth to the Model Code on obscenity, virtually every speaker emphasized the importance of testimony by social scientists and book critics in attempting to separate the constitutionally protected from the "obscene." American Law Institute, Proceedings, 34th Annual Meeting, 1957, pp. 158-174, 187, 194-202.

Professor Louis B. Schwartz, one of the Associate Reporters at the meeting, discussing the admissibility of evidence under the Model Code, said:

" . . . when we are trying to put somebody in jail for disseminating literature that is tasteless or worse, we cannot ignore the fact that we have a great deal of tolerance in advertising, in films and libraries for material which has some of this quality of an appeal to prurient interest."

From all of the aforesaid, it would appear that there are two crucial issues for the "trier of the fact" to determine whenever the legitimacy or illegitimacy of a writing is presented: (1) what is the predominant appeal of the material to the average normal person;* (2) what are the outer limits of custom in description or representation of sexual matters. Unless these two issues are fairly decided, the possibility exists that writings protected from all governmental infringement will be condemned, and innocent persons unjustly punished by fine and imprisonment. Therefore, the responsibility rests upon the municipality "to provide procedures amply adequate to safeguard against invasion of speech which the Constitution protects", *Speiser v. Randall*, 357 U. S. 513, 524. The vice of excluding all evidence offered by an accused pertaining to the essential issues involved in the determination of "obscenity" is that "the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized" (*supra*, at p. 526).

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*Mr. Justice Harlan in *Alberts* sustained the construction of the State "obscenity" statute, holding, among other things, that the State could rationally assume that some "pornographic" material can induce "sexual conduct" or have a long time "eroding effect or moral standards" (pp. 501-502). Without accepting the aforesaid premises or the conclusions therefrom, appellant submits that this would not justify holding that in a criminal prosecution for "obscenity," the accused is therefore precluded from adducing evidence showing that written material has no appeal to prurient interest or does not go beyond customary limits of expression—as appellee seemed to imply in its motion to affirm or dismiss the appeal (p. 8). Assumptions made by a legislature in the course of the legislative process are one thing; the sufficiency of such assumptions for purposes of a criminal trial are quite different. Such conjectures are not *proof* and clearly not conclusive in any particular criminal prosecution. See, *Whitney v. California*, 274 U. S. 357, 378-379; *Tot v. United States*, 319 U. S. 463, 466-467.

It is settled that the due process provision of the Fourteenth Amendment was intended to guarantee procedural standards adequate and appropriate to protect at all times persons charged with or suspected of crime by persons holding positions of power and authority. *Chambers v. Florida*, 309 U. S. 227. In the entire literature of the law, no concept embodied in the notion of due process seems more fundamental than the one that no person should be condemned without notice of the charge and an adequate opportunity to be heard in defense of it. "This Court has never attempted to define with precision the words 'due process of law', nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense" *Holden v. Hardy*, 169 U. S. 366, 389-390. "Can it be doubted that due process of law signifies a right to be heard in one's defense? . . . *Hovey v. Elliott*, 167 U. S. 409, 417. "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given" *Morgan v. United States*, 298 U. S. 468, 480-481.

Fundamental then in the concept of due process, and in liberty, is the thought that condemnation shall follow only after hearing and opportunity to defend. The hearing, moreover, "must be a real one, not a sham or a pretense." *Palko v. Connecticut*, 302 U. S. 319, 327. There is no

real opportunity to defend, for example, when ignorant persons, in a capital case, are refused the assistance of counsel. *Powell v. Alabama*, 287 U. S. 45. There is no fair opportunity to defend when the state arbitrarily creates presumptions which operate to preclude the accused from the right to present his defense to the facts presumed. *Bailey v. Alabama*, 219 U. S. 219; *Manley v. Georgia*, 279 U. S. 1; *Morrison v. California*, 291 U. S. 82; *Tot v. United States*, 319 U. S. 463. So the suppression of testimony favorable to an accused by the prosecution has been held a denial of due process. *Pyle v. Kansas*, 317 U. S. 213; *Mooney v. Holohan*, 294 U. S. 103.

Moreover, and consistent with the aforesaid, *deprivation of the right to present evidence bearing on the issues has been specifically adjudged by this Court to be a denial of due process. Saunders v. Shaw*, 244 U. S. 317, 319; *Chin Yow v. United States*, 208 U. S. 8, 11-13.

Thus, by the exclusion of the evidence, the courts below did not commit mere error, but deprived appellant of his liberty without due process of law in violation of the Fourteenth Amendment, because he was denied a fair hearing. Since this curtailment of liberty, in operation and effect, necessarily results in restrictions on constitutionally protected speech and press activities, this denial of procedural due process also leads to a denial of substantive due process. *Grosjean v. American Press Co.*, 297 U. S. 233, 243-245; *Herndon v. Lowry*, 301 U. S. 242, 263.

The ordinance, as here construed and applied, licenses the trier of the fact to create his own standard of what is constitutionally protected speech in each case; authorizes the trier to disregard evidence which proves that the writ-

ing expresses ideas accepted with candor by the community. Thus, the "safeguards" allegedly created by the tests for judging "obscenity", enunciated by this Court, are swept aside and the "door barring federal and state intrusion" into the fundamental freedoms of speech and press are left widely "ajar". *Alberts v. California*, 354 U. S. 476, 488.

IV.

The Courts Below Improperly Applied the Unconstitutionally Restrictive Hicklin-Besig Test.

In *Alberts v. California*, 354 U. S. 476, this Court held that Section 311 of the California Penal Code, "applied according to the proper standard for judging obscenity" (p. 492), did not offend constitutional safeguards against convictions based upon protected material.

What were these standards? First, the book must be read as a whole. Where the total appeal of the book is not prurient, the writing is not to be condemned because some portions of the story contain realistic portrayals of sex. Second, the book is to be judged in relation to the normal adult reader. This is to prevent the unconstitutional result of limiting the adult population to reading only what is fit for children or particularly susceptible adults. Third, the dominant appeal of the book must be to a prurient interest, *i.e.*, a shameful or morbid interest in sex. If the book contains artistic, literary, scientific or educational ideas, if the normal adult can read and discuss the book candidly and openly, then the book cannot be condemned as "obscene". If this ingredient of the test were not present, virtually all works of art and literature would be endangered since each and every book or art work may at some time or another appeal to a prurient interest. Fourthly, the appeal to prurient interest must be

by description or representation going substantially beyond customary limits on free expression. The significance of adopting the test of "contemporary community standards" is that it recognizes that "our civilization tolerates much that experts or particular segments of the population might regard as appealing primarily to prurient interest." American Law Institute, *Model Penal Code*, Tentative Draft No. 6, p. 31. If comparable representations or descriptions of sex in books are generally accepted, it would be intolerable that a writing should be interdicted because it offended the aesthetic or literary tastes of particular groups in the community.

The aforesaid are the ingredients of the constitutional test for "obscenity" which were propounded by this Court in *Roth-Alberts*. Even as this Court enunciated these standards, there was recognition of the danger to fundamental freedoms in failing to apply these standards, or in applying them improperly. Actually there are two sides to the coin: what must be determined is not only what is "obscenity", but more important perhaps, what is not. Thus, "sex and obscenity are not synonymous . . . The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press . . . Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern" (*Alberts v. California, supra*, at p. 487).

Moreover, discussion of these vital problems, since they are matters of public concern and because information and education is needed with respect thereto to enable members of society to cope with them (*supra*, at p. 488; see,

Thornhill v. Alabama, 310 U. S. 88, 101-102) are embraced within the guaranteed freedoms of speech and press. Thus, "the fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest" (*supra*, at p. 488).

(a) How did the courts below apply the aforesaid standards to the book herein? To the trial court, the book had to be measured by the response of a child or perverted adult, and not necessarily by the response of average or normal individuals [R. 74-76]. To the trial court, it seemed that just because the general public would not be interested in reading the book [R. 76], it did not follow that the book should "be left open for other persons who would be affected by it and who ought to be protected from it" [R. 76]. "As we know", stated the trial court, "youth has an inquiring mind on everything. . . . And because of that the police measures for public safety and morals and health, under which, the theory of this ordinance was passed, must do its work, as I see it, and it can't be applied to those who are already vaccinated, you might say, by experience and by time" [R. 77]. The court felt substantially that the trier of fact could find that the writing had a tendency to corrupt or deprave youths [R. 79]. The "effect of that material on

young people" [R. 90] was the constant complaint of the court.*

To the trial court, the importance of the "average, normal mind" was that it was this kind of mind which would function as "the average normal jury" [R. 77]. These persons, or jury, are the "thermometer, so to speak, measuring the heat or quality of the thing" [R. 77]. The jury measures the heat or quality of it" [R. 77]. They may "reject it as reading matter for themselves", but "leave it" free, if "it is of a low temperature" [R. 77]. The trier of the fact is, therefore, "like a measuring instrument, like for instance a thermometer" [R. 81]. In the trial court's view, the average, normal person so reading the book would "reject" it at "the end of the first page" [R. 76], but they "would undoubtedly take some steps to prevent it coming to the attention of others or younger people who might be affected by it" [R. 77].

If the reading of books is not to be degraded to the level of inanity, if books are not to be treated like patients in a hospital, to be released only when the fever charts are normal—it is submitted that the aforesaid standards cannot be accepted for judging "obscenity". These standards are essentially the *Hicklin* standards, which met their demise twice in this Court. *Butler v. Michigan*, 352 U. S. 380; 384; *Alberts v. California*, 354 U. S. 476, 489.

(b) At no time did the trial court find that the predominant appeal of the book was to the prurient interest of the average adult nor that the book would have a substantial tendency to corrupt or deprave the average adult

*Taking his cue from the trial court, the prosecutor stated: ". . . all I can say is that apparently if we take Mr. Fleishman's argument for what it appears to be, then these book merchants are a lot more important people than any children" [R. 90].

by arousing lascivious ideas or lustful desires. Although the trial court had taken the book home and read it "three times" [R. 91], still the effect was one of depression only [R. 82]. When it was suggested that this appeared to be different from a tendency to corrupt or deprave, the trial court stated: "But remember, sir, I am not a young man" [R. 82].

Essentially, it was not the manner in which sex was portrayed in the book to which the court objected, nor its appeal to prurient interest. It was the theme of the book, "that kind of a plot" [R. 82] which offended the court. "It didn't even explain why the woman in the book had separated from her husband; they just separated, leaving her with the secretary, young woman secretary, and her designs thereafter, which she carried out. It is true that she had some contact with a man. I don't know whether this was intended to be a lift up from the depths to which she had gone before or what it was. But it was there" [R. 91].

The failure of the author, therefore, to explore the relations between the principal character and her husband appeared to the court to be a fault. Nor was her sexual variance mitigated, in the court's view, by some apparently normal contact with a man.

What appeared to be the principal objection of the trial court to the book was that it actually presented a plot where an incidental character, a woman secretary, was subjected to the advances of her woman employer, became a willing recipient of those advances, only to be soon rejected and discarded. This aspect of the story, therefore, in the court's view delineated a picture of the fall of a normal person to corruption and depravity. Such a story, insisted the court, was all too true in real life and

it was just too depressing to be read, except by those who, like the court and counsel, have "some duty to perform" [R. 82].

Thus, it will be observed, the trial court did not find that the predominant appeal of the book was to a prurient interest or that it had a substantial tendency to corrupt and deprave. Instead the trial court held that the book discussed "corruption" and "depravity", that it portrayed what "we do know" [R. 82], that a perfectly normal person may become "changed and altered" [R. 82]; that a book which realistically portrays the fall of a normal person from grace is "obscene". The category of works thus banished (Somerset Maugham's *Of Human Bondage* and Radclyffe Hall's *Well of Loneliness* momentarily come to mind) would be legion. When a book portrays the actualities of life such revelations should not *per se* make the book "obscene". Just because a book tells the truth does not mean the book is playing "Satan's game" Farrell, *Literature and Morality* (1945), p. 93.

In failing to apply the ingredient of "predominant appeal", and condemning the work because of its theme, the trial court's judgment clearly invaded protected areas of free speech and press. *Kingsley Int. Pic. Corp. v. Regents*, 79 S. Ct. 1362; *Cantwell v. Connecticut*, 310 U. S. 296, 310.

We have heretofore noted that the standard of "contemporary community standards" was entirely excluded from the trial court's consideration [R. 43-50, 50-74]. Whether the book herein in any way went substantially beyond customary limits of candor in description or representation of sex did not concern the court. References to such works as "Peyton Place" [R. 80-90], a work which

prurient interest and in realistic descriptions of sex far exceeds anything contained in the book herein, were dismissed as follows: "May I ask you, is that supposed to be a standard for people to write by? It isn't a law. It is a mere example of what I would say might be another violation. I don't know what the purpose of the book was . . . certainly not a standard for us . . . The standard that we draw is whether it is obscene and indecent" [R. 88].

The decision of the Appellate Department below plainly confirms the dangers forseen by this Court in *Roth-Alberts* in failing to apply the proper standards for testing the "obscenity" of a writing. Mr. Justice Brennan in *Roth-Alberts* stressed that it was "vital" (p. 488) to apply the proper standards. Mr. Chief Justice Warren stated that great care must be taken to avoid "mistakes of the past" (p. 495). Mr. Justice Harlan emphasized that the determination that a book was "obscene" was "a question of constitutional judgment of the most sensitive and delicate kind" (p. 498).* And Mr. Justice Douglas with Mr. Justice Black concurring suggested that the tests adopted for "obscenity" would give "the censor free range over a vast domain" (p. 509).

In upholding the standards applied by the trial judge, the court below avoided any discussion of the book itself. An "obscene" book, stated the court, has no constitutional

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*Mr. Justice Harlan also stated: "I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case" (p. 498). The opinion of the court below would appear to exemplify the attitude that Mr. Justice Harlan

protection [R. 10]. Therefore, the only question which remained was whether the book was "obscene." The book, stated the court, was properly held obscene, "under any test" [R. 10]. The court shared the conclusion of the trial judge "upon our independent view of the evidence, if that be necessary in view of the assertion of constitutional right, though such a right is clearly non-existent" [R. 10]. The community standard is, "as in other criminal matters," to be determined by "the trier of the fact" [R. 10-11]. But evidence with respect thereto was properly excluded, since legislation is not invalid "which seeks to restrain that which is popular" [R. 11], and it is not error to exclude evidence as to the contents of other books, "alleged to be no different or even more sexually titillating" [R. 11]. There were "common-sense limits" to the "over-all view," stated the court [R. 11], citing *Besig v. United States*, 208 F. 2d 142, 146 (C. A. 9, 1953), and asserting that a book was "not necessarily clean" because some of the chapters leading to the bedroom "did not describe the details of adulterous fornication nor rape" [R. 11].

The trial judge, as we have endeavored to show, plainly relied on the *Hicklin* standard in testing the alleged "obscenity" of the book. The appellate court below upheld the application of this unconstitutionally restrictive test, making it clear that it continued to rely on the test by citing the *Besig* decision. As is well known, the decision in *Besig v. United States*, 208 F. 2d 142 (C. A. 9, 1953), finding Henry Miller's *Tropic of Cancer* and *Tropic of Capicorn* obscene and unimportable, adhered to the *Hicklin* test long after many American courts had abandoned it. Note, *Obscenity and the First Amendment: The Search for an Adequate Test* in 7 Duke L. J. 116, 119 n. 17

The Appellate Department, obviously aware that the trial court had applied erroneous standards, opined that the book was objectionable "under any test." Not only was this label too vague and ambiguous to support the trial court's ruling, but affirmance was possible, it is submitted, only if the *Hicklin-Besig* test were constitutionally acceptable. The trial judge (sitting as a jury) convicted appellant solely on the basis of the *Hicklin-Besig* test. His judgment was governed solely by that test. If another test was to be employed, appellant was entitled to have the "trier of the fact" exercise his independent judgment under such different test, where additional evidence may have been necessarily admissible. (*Cole v. Arkansas*, 333 U. S. 196; *Butler v. Michigan*, 352 U. S. 380; *Mounce v. United States*, 355 U. S. 180; *Stromberg v. California*, 283 U. S. 359.)

The reasons for the exclusion of evidence of "contemporary community standards" given by the courts below, were based upon a fallacious premise, it is submitted. Evidence relative to "contemporary community standards" is not offered to prove that other alleged "obscene" books are "popular." The wide acceptance of these books is intended to show that the sensibilities of the public are not offended by material of a comparable character in theme and depiction. Such evidence establishes that the allegedly prurient book is not disapproved by generally observed custom, that the material does not go beyond "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." *United States v. Kennerly*, 209 Fed. 119, 121 (S. D. N. Y., 1913), opinion by Judge Learned Hand. See American Law Institute, *Model Penal Code*, Tentative Draft No. 6 (May 6, 1957), pp. 31, 44, 45. It is the

ingredient of "contemporary community standards" which ensures that material dealing with sex in art, literature and scientific works will be protected from official suppression.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Appellant.

SAM ROSENWEIN,
PAUL C. ROSS,
BROCK, FLEISHMAN & RYKOFF,
Of Counsel.

APPENDIX "A."

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The provisions of §41.01.1 of the Municipal Code of the City of Los Angeles are:

> "INDECENT WRITING, ETC.—POSSESSION PROHIBITED.
>
> "It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places:
>
> 1. In any school, school-ground, public park or playground or in any public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;
>
> 2. In any place of business where ice-cream, soft drinks, candy, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;

3. In any toilet or restroom open to the public;

4. In any poolroom or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public;

5. In any place where phonograph records, photographs, motion pictures, or transcriptions of any kind are made, used, maintained, sold or exhibited."

4. The provisions of California Penal Code §311, subdivision (3) are:

"every person who wilfully and lewdly, either: . . ."

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or, . . ."

". . . is guilty of a misdemeanor."

Supreme Court of the United States

[redacted]

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

APPELLEE'S BRIEF.

SUBJECT INDEX

PAGE

I.

Statement 1

II.

Questions presented for review 2

III.

Summary of argument 3

IV.

Obscenity is not constitutionally protected as an exercise of free speech 3

V.

The book Sweeter Than Life is obscene 4

VI.

There is no constitutional requirement that knowledge of the obscene character of the book be an element of the offense 28

VII.

The rejection of appellant's purported expert witnesses did not deprive appellant of any constitutional protection 33

VIII.

A proper test for obscenity was utilized in determining the chaacter of the book Sweeter Than Life 36

IX.

Conclusion 37

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Barham v. Widing, 210 Cal. 206, 291 Pac. 173	34
Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 31 S. Ct. 512, 55 L. Ed. 582	32
Commission v. Graustein & Co., 209 Mass. 38, 95 N. E. 97	30
Groff v. State, 171 Ind. 547, 85 N. E. 769	29
Meigs v. State, 94 Fla. 809, 114 So. 448	29
New Orleans v. Vinci, 153 La. 528, 96 So. 110	29
People v. Daniels, 118 Cal. App. 2d 340, 257 P. 2d 1038	30
People v. Durant, 116 Cal. 179, 48 Pac. 75	34
People v. Grana, 1 Cal. 2d 565, 36 P. 2d 649	37
People v. Kibler, 106 N. Y. 321, 12 N. E. 795	30
People v. Lindsey, 90 Cal. App. 2d 558, 203 P. 2d 572	37
People v. McClennegan, 195 Cal. 445	31
People v. Schwartz, 28 Cal. App. 2d Supp. 775, 70 P. 2d 1017	29
People v. Wepplo, 78 Cal. App. 2d Supp. 959	29, 33, 36
Roth v. United States, Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498	3, 35, 36
Shevlin Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. Ed. 930, 30 S. Ct. 663	33
State v. Huber, 4 Boyce 259, 88 Atl. 453	29
State v. Rogers, 95 Me. 94, 49 Atl. 564	29
United States v. Balint, 258 U. S. 250, 42 S. Ct. 301, 66 L. Ed. 604	31, 33
United States v. Dotterweich, 320 U. S. 277, 64 S. Ct. 134, 88 L. Ed. 48	30
Weigand v. District of Columbia, 22 App. D. C. 559	29
Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577	33
Zelayeta v. Pacific Greyhound Lines, 104 Cal. App. 2d 716, 232 P. 2d 572	35

STATUTE

Los Angeles Municipal Code, Sec. 41.01.1, par. 2	1, 2, 3, 4, 28, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 519

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

APPELLEE'S BRIEF.

I.

Statement.

This is a direct appeal from a judgment entered June 23, 1958, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District, with having committed various violations of paragraph 2 of Section 41.01.1 of the Los Angeles Municipal Code. It was alleged that appellant "did wilfully and unlawfully . . . have in his possession an obscene and indecent writing, book, pamphlet, picture, photograph and drawing, to wit, *Sweeter Than Life*, in a place of business, where magazines, books, pamphlets, papers and pictures were sold and kept for sale."

The case was tried by the court without a jury and appellant found guilty of such charge. An appeal was duly taken to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matter was submitted and thereafter the judgment was affirmed [R. 9, and 161 Cal. App. 2d Supp. 860, 327 P. 2d 636]. A petition for rehearing was filed and denied [R. 19]. A notice of appeal to this Court was thereafter presented, and probable jurisdiction was noted on January 19, 1959 [R. 96].

II.

Questions Presented for Review.

Whether the book *Sweeter Than Life* is protected by the guarantees of freedom of speech and press in the United States Constitution;

Whether Section 41.01.1 of the Los Angeles Municipal Code violates due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution in not requiring that the defendant have knowledge of the character of the material in question;

Whether due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution requires the testimony of expert witnesses to determine obscenity;

Whether the law in question was applied to the defendant by the trial judge in violation of the First and Fourteenth Amendments to the United States Constitution as to tests utilized to determine the question of obscenity.

III.

Summary of Argument.

The book *Sweeter Than Life* is obscene and thus not subject to freedom of speech and press as guaranteed by the United States Constitution.

Section 41.01.1 of the Los Angeles Municipal Code [R. 10; Appellant's Br. Appx. "A"] is a valid exercise of the police power. It is not a pre-censorship law and is not aimed at obscenity as such, but at the possession of obscene material in such places as schools, school grounds, parks, play-grounds, businesses selling ice cream, candy, school supplies, and books, public toilets, pool-rooms, phonograph record stores, and places where liquor is sold. There is no constitutional requirement that such a law include knowledge of the character of the obscene material on the part of the violator.

It is not a denial of due process of law to exclude the testimony of "experts" on the subject of obscenity in the determination of that issue, such being a rule of evidence of the state court as to the weight and usefulness of such evidence.

If the book *Sweeter Than Life* is obscene by legal standards, remarks of the trial judge in the course of the trial as to tests for obscenity do not make the book less so, and the appellate court found the book obscene by any test.

IV.

Obscenity Is Not Constitutionally Protected as an Exercise of Free Speech.

This court in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476, 1 L. Ed. 2d 1498, dwelt at length on the subject of freedom of speech in relation

to obscenity, and concluded with the statement: "We hold that obscenity is not within the area of constitutionally protected speech or press."

Section 41.01.1 of the Los Angeles Municipal Code [R. 10; Appellant's Br. Appx. "A"] outlaws only obscene and indecent material. Thus, if the book *Sweeter Than Life* is obscene, no problem of free speech can arise.

V.

The Book Sweeter Than Life Is Obscene.

Appellant's brief (pp. 48-52) contains a synopsis of the "plot" of the book *Sweeter Than Life*, if the linking of a veritable smorgasbord of sex acts can be dignified by such a term. The characters of the book engaging in such sex acts are:

Nym Bardolph,

who has sex acts with:

(1) her teen-age girl friends (pp. 38 and 66);

(2) her husband (pp. 53 and 78);

(3) Lynn, her female secretary (pp. 20 and 109);

(4) Johnny Martel (pp. 101-105, 105-106 and 111);

(5) Frederick "Tiny" Gordon's "boys" (raped by them) (pp. 163-167);

(6) observed a sex act between her mother and another woman (pp. 37-38).

Lynn (Nym Bardolph's female secretary),

who had sex acts with Nym Bardolph (pp. 20 and 109-110).

Frederick "Tiny" Gordon,

whose "boys" beat and rape Nym Bardolph (pp. 163-167).

Johnny Martel,

who has sex acts with Nym Bardolph (pp. 101-105, 105-106 and 111).

Mickey Stanton (Johnny Martel's fiancee),

who has sex acts with Johnny (pp. 117-119 and 128-129).

Appellant indicates that the book utilizes the "flash-back" and "stream of consciousness" techniques (Appellant's Br. p. 48). Whatever such techniques may be, they do not leave the reader long deprived of a description of a sex act between two or more of the characters. These descriptions include:

1. A sex act between Nym Bardolph and her female secretary (pp. 20-24):

> "Nym stirred restlessly as she regarded the small childlike face and the slender figure. Her mouth grew dry and she rose from her chair and walked around the secretary to the water cooler behind the girl's back. Over the edge of the cup she saw the healthy straightness of the spine and the taut boyishness of the hips. She saw the faint line of the panties where the sitting position pulled the thin summer dress tightly against the rounded thighs.
>
> "A shuddering sigh found its way into her throat and the hand that held the paper container trembled slightly so that the edge of the cup touched her teeth once or twice.
>
> "*Why not?* The thought went through her head like the searing mark of a branding iron. Why not? For eight years I have controlled it so that there should be never a mark against me. But now I am free. Now I am my own mistress.

"She thought briefly of Sean and the hunger grew in her, grew and grew.

"'Lynn . . .' She was amazed and a little frightened to realize that her voice was deeply hoarse and shook with ill-concealed desire. 'I'm going to the inner office. I am taking over for Mr. O'Sullivan for a while. He . . . he's gone on a vacation.' Why *couldn't* she make herself say that he was gone for good? That she had driven him out? 'There . . . there are some letters I want you to take. Lock the front door so we won't be disturbed and come in there with your notebook, will you?'

"'Of course, Mrs. O'Sullivan.'

"Nym left the front room rapidly, her knees shaking as she walked. She was gripped by a dreadful excitement. An excitement that turned her stomach to jelly and her knees to rubber joints. She had trouble breathing.

"How long had she thought like this about the small blonde girl? Now, when she thought back, it seemed as if the desire had been latent in her from the moment she first saw her two years before when Lynn had come, fresh from business college, to work for Sean.

"Sean's, or rather *her* inner office was a large room, luxuriously furnished in starkly modern style. She walked across the softly carpeted floor and sat down on the long couch that ran the entire length of one wall. Unconsciously she smoothed the cushions beside her with a hand that seemed to tremble more and more.

"When Lynn entered the room Nym greedily devoured her slender trimness with her eyes. Al-

though she was twenty-three years old. Lynn was like a child, nubile and whitely tender. Small of face and small of breast and small of hip.

"Nym patted the couch at her side and Lynn came obediently and sat down, her pad and pencil ready in her lap.

"'I . . . eh . . . I want to . . . to . . .' Nym found to her horror that she was stammering like an idiot. With a violent effort she forced her voice under control. 'I want to write a note to Mr. Samson—you know the man who owns that property by Lake Okeechobee. I want to—'

"'Mr. O'Sullivan already wrote him last Thursday, Mrs. O'Sullivan.'

"'Oh . . . oh, I see. Well, in that case we can let it go. All right then, suppose we write to—' Suddenly she broke off. When she continued, her voice had a strangely pleading note in it. 'What do you do for fun, Lynn?'

"'I beg your pardon, Mrs. O'Sullivan?

"'I mean—I know it's a strange question, coming so suddenly—I just mean . . . I simply happened to wonder about it, that's all.'

"'Wonder about what?' The girl's face was puzzled.

"'Well, about what you do for fun. You know . . . nights and all.'

"Lynn smiled. 'Oh, I don't know. Go to the movies. Read. Things like that.'

"'Do you have a—a boyfriend?'

"'Not really. I date now and then, but most of the boys around here are kind of dull, Mrs. O'Sullivan.'

"Nym smiled her famed, dazzling smile. 'Isn't it the truth, though? It must be very difficult for a young single girl away from home to find anything exciting to do here in Okeechee.'

"'*You* found something to do, Mrs. O'Sullivan.'

"'I wasn't away from home, though.'

"'No, that's true.'

"Nym could not control herself any longer. She laid a hand on the girl's knee, knowing full well that its trembling was bound to be noticeable. 'Lynn . . .' she began hoarsely. The girl looked at her, fright growing in her eyes. 'Lynn . . .'

"'Mrs. O'Sullivan, I think I'd better go watch the front office. Someone might want to come in.'

"'Don't go, Lynn. Please don't go.' Great tears were beginning to roll down Nym's cheeks. Tears of excitement, tears of long pent-up tension, tears of self-pity. As great wracking sobs started from her throat she flung herself against the girl, her arms gripping her tightly as in a vise.

"Lynn began to struggle. 'Mrs. O'Sullivan! Mrs. O'Sullivan—please, what are you doing?' She fought strongly, straining to push Nym away and ward off the onslaught. Nym clung tightly. With one hand she held the girl down and with the other she proceeded to unbutton the light summer dress. She threw all caution, all shame, to the winds and the short concise words of her desire gritted from between her teeth as she stripped the dress from Lynn.

"The girl was silent now and fighting desperately to get away, but Nym was by far the stronger of the two.

"'I'll scream, Mrs. O'Sullivan, I'll scream!' Lynn whispered, her terror-stricken voice strained by the effort of the struggle.

"Nym did not care any longer. 'Scream,' she muttered between her clenched teeth. 'Scream and let everybody come in here and find you like this. Go ahead, scream.

"Lynn fell silent, saving her breath for the violent fight. She was wearing only a half-slip and it was jerked from her hips in one large motion. Nym cried out when she saw how beautiful the little white body was which she had almost denuded. Lynn was wearing the very smallest of pale blue panties that fit her slender, rounded hips as if they had been painted on. The matching small-cupped brassiere clung closely to the hard breasts whose childish pink points gleamed faintly through the net material.

"Nym bent forward and placed her mouth upon the girl's. Lynn fought and strained, twisted and turned, but her mouth remained covered by the kiss which forced itself upon her. Nym's tongue gently caressed her gradually opening lips.

"Lynn cried out against the constraining mouth when the brassiere fell from her shoulders and Nym's hand found the mobile breasts, molding and caressing until she felt the tips harden. Her breath began to come in great heaving gasps.

"Then gradually the girl's struggles tapered off until she lay quite still with her eyes closed, allowing Nym's educated hands to do their work upon her. She stirred only once, as if to cover herself, when she felt the panties slide from her hips and heard Nym's little gasp of admiration.

"Yes, the time came when she even helped, as Nym stripped the clothing from her own lush body, revealing blue-veined breasts that were so full that they seemed swollen, their great dark eyes gleaming dully against the white flesh. And as Nym sank slowly before her, Lynn started sobbing softly and her body arched in frantic ecstasy.

"And then there were no sounds in the office but the sounds of love."

2. A sex act between Nym Bardolph's mother and another woman (pp. 37-38):

"Lying on the couch, her face a mask of frantic ecstasy, was the red-haired schoolteacher. And bending over her, one knee resting on the floor, was Nym's mother.

"They were both completely naked.

"Deep-throated hoarse animal groans poured from the little redhead. Her eyes were tightly closed and her hands were clutched in Lucy's hair.

"Nym stood like the salt statue of Lot's wife. She could no more have torn herself away from the spectacle than she could have stopped the heaving breaths that tore at her lungs as she watched her man-mother convulsively tormented by her love-drunk ecstatic escape. As the moans from the other room mounted into a frenetic, wracking sob, the furious pounding in her chest grew and grew until she had to cling to the wall for support.

"She remained there for perhaps ten or fifteen minutes after it was all over and silence had settled over the house and the two women on the couch were asleep in their exhaustion, the smiles of happy little girls upon their faces.

"Then finally she went shakily to the kitchen, got her drink of water, and returned to her bed.

"But she did not sleep again that night.

"And from that night on, Nym added a new field to her rivalry with the hated boys. She took their dates away from them. She was very clever at it. Very discreet. And many a little innocent girl, afraid of experiencing too close a contact with a boy, through Nym discovered hidden pleasures which she had never dreamed existed. Pleasures which could be indulged in without danger of unpleasant aftermaths. Pleasures which could be freely enjoyed, for there is nothing unusual about a girl staying at another girl's house."

3. Nym Bardolph's attempt at a sex act with her husband (pp. 52-55):

"Resolutely she rose from her seat before the mirror. She stepped to the middle of the floor, and admiring herself in the gleaming glass, she started to strip the clothes from her lush body.

"She pulled the peasant blouse over her head, revealing a white satin strapless brassiere which confined her breasts. She undid the waistband of her full skirt and dropped it about her ankles. The white half-slip followed, and Nym Bardolph stood revealed in white transparent panties, generously garnished with lace about the thighs. She reached behind her back and released her breasts.

"She faced the mirror complacently, her eyes resting approvingly on her own body. Her figure was slim, the hips almost boyish, but with a hint of curves that seemed to negate the very slimness which

was the most striking thing about her lines. Nym's breasts were large, very large for a girl her size, but there was not a hint of sag about them. With a soft, sensuous movement, she lifted them gently with her hands, weighing them thoughtfully in her cupped palms. Finally the hands glided upward and over them, and with a sharp little intake of her breath she felt the wide peaks stir. When she removed her hands the points were taut.

"Nym's fingers were trembling a little as they went to the waistband of her panties. She rolled the garment slowly down over her hips. It released itself reluctantly from her legs and dropped unnoticed to the floor. Unnoticed because Nym was admiring herself again in the mirror, her eyes roving over the dimpled flatness of her white stomach, over the mystic promises of shadowed recesses and nooks.

"Finally she tore herself away from the glass and entered the bathroom adjoining her bedroom. She ran hot water in the tub, sprinkling a generous amount of bubble soap into it. And soon she was immersed in the soothing, fragrant liquid. Hurriedly now, she bathed, and after drying and powdering her trim, lovely body, she entered the bedroom. From the huge closet which formed one wall of the room she removed a black transparent negligee. She wrapped the diaphanous garment about her naked body and left the room.

"As she walked softly down the hall she discovered a new excitement in herself. This was not like the other times when—for a similar reason—she had traversed the same distance. She knew that deeply

within herself. There was another reason that palpitated excruciatingly in her vitals.

"Outside the door to Sean's room she hesitated. She examined again her motives for this visit to a man whom she had never touched in love, but only in her attempts to gain advantages over him in their life-locked struggle which had lasted so many years. And she did not now understand herself.

"Giving up, she gently eased the door ajar and slid inside. Sean's room was softly lighted by a shaded lamp on a bedside table. He was lying in bed, his arm locked behind his head upon the pillow, a cigarette drooping from the corner of his mouth. As Nym entered the room, he turned his head toward her inquiringly, but did not otherwise move.

"'Sean?' She spoke his name hesitantly.

"'Hmm?'

"Nym was conscious of his eyes sliding over her thinly veiled figure. She knew that her white flesh shone luminously through the sheer material and the knowledge pleased her. 'Sean . . . I . . .'

"'Yes?'

"She moved closer to him. 'Are you sleepy, Sean?'

"'Not particularly.'

"She sat down on the edge of the bed. 'You want to make room for me?'

"'No, Nym, I don't.'

"It was like a bucket of cold water over her shoulders, but she controlled herself. She slid the negligee from her shoulders and let it drop about her waist. As her full, proud breasts sprang into view, quivering with the motions of her arms, she watched his

face and saw his eyes narrow. She saw the slight twitch of his hand on the cover, and she took it and put it against her flesh.

"'Now?'

"His hand was loose and open. It did not fondle her nor make any motion at all. His face was expressionless and she felt a cold shiver run through her. Sean had never been devoid of reaction before."

4. A sex act between Nym Bardolph and a teen-age girl friend (pp. 66, 67):

"When Lynn returned from lunch Nym hardly glanced at her, so occupied was she with her problems.

"The girl stopped before the big desk and murmured, 'I'm sorry I took so long. I . . . . I went home and took a bath.'

"Nym looked up sharply. 'A bath? Did you feel unclean?'

"'Oh, no!' No, Nym! I . . . . I just wanted to look at myself.'

"Nym smiled slowly. She understood. The same thing had happened to her once, long ago. It had been the first time for her too. A wild, orgiastic night not long after she had seen her mother and the little red-haired schoolteached together. The other girl had been a little brunette in whom Nym had discovered a pent-up emotional volcano that she had manipulated into furious eruption. The next morning, when she arrived home, she locked herself in the bathroom and languourously, sleepily, stripped her trim sixteen-year-old body. Then she

carefully examined herself in the large mirror fastened to the inside of the door. No nook or cranny went uninspected. Her hungry eyes searched and searched. Finally she stretched herself in the warm, soothing water.

"She had gone to sleep there and nearly drowned.

"Now she asked Lynn the same question that had been on her own mind that morning ten years ago. 'And have you changed any?'

"The little blonde blushed. 'Well . . . no . . . not really. Not anything you can see, anyway.'

"'I know. It doesn't show.'

"'Oh, Nym. I feel different, though.'

"'Bad?'

"'No, no! I . . . I feel . . . oh, I don't know. Wonderful, I guess.'

"'Good.'"

5. Sex acts between Nym Bardolph and her husband (pp. 78, 79):

"It must have surprised him then to find her coming to his bed at night, willing, passionate, inventive, eager, fulfilling—no, going far beyond—his wildest dreams of blissful satiety in her arms. She came to him nude, her splendid body gleaming in the lamplight, her breasts quivering with the most apparent physical desire, her hands no longer cheating him, her mouth a moist cavern of accomplishment, her flesh a haven of blissful satisfaction. Or she came to him shrouded in a variety of veils of provocation which he, with eager, trembling hands, was privileged to strip her of—while she, with half-shut eyes, pretended to dream about and lovingly anticipate the final moment."

6. Sex acts between Nym Bardolph and Johnny Martel (pp. 101-105 and 105-106):

"She untied the knot at her waist and shrugged out of the white silk shirt. She reached behind her back and unhooked her brassiere. After removing it from her shoulders, she dropped it on the bunk beside her. Then she put the shirt back on. Before fastening it in front she cupped her straining breasts with her hands and kneaded them thoughtfully. She weighed them and let them drop and felt the elastic give of her skin as it took their full weight.

"After a little while she retied the knot at her waist. She did not button the shirt and it formed a deep V that reached from her throat to the bottom of her ribcage, revealing her gleaming olive skin. Then she rose and looked at herself in the little rectangular mirror that hung over one of the bunks. Her action had had the desired effect. The promising peaks of her bosom showed through the thin material. She nodded her head and turned toward the door.

"She was breathing unnaturally fast as she left the cabin and joined Johnny in the stern of the boat. He turned to greet her and she saw his eyes widen as they came to rest on the front of her shirt. She heard the deep intake of his breath and noted the quick, futile movement of his hand on the gunwhale.

"She stepped close to him, but he drew away and she did not pursue her purpose at the moment. She climbed again to the top of the cabin and sat there, her legs dangling. 'I'll take that beer now, Johnny.'

"He fumbled in the icebox, punched a can open and brought it to her, his eyes never leaving the front of

her shirt. When he was close to her, she reached out and ruffled his short reddish-blond hair with her fingers.

"'I wish I *had* told you eight years ago, Johnny,' she whispered.

"He turned away without answering and returned to his rod. But he did not pick it up. He sat down on the gunwhale and stared into the rippling water. 'It's too late now, Nym,' he muttered.

"'Is it?' Her voice was bright.

"'You're married and I'm about to be married.'

"'I'm separated and you're not married yet. That's not quite the same thing.'

"He did not answer that, but from the expression on his face, she could tell that he was turning the thought over in his mind.

"Boldly she said, 'Johnny, look at me.' As he turned reluctantly, she threw her shoulders back. She knew that he could see right through the shirt. 'Am I still desirable?'

"His voice was a groan. 'Oh, Nym!' It was a choked moan and he looked as if he were about to cry.

"She laughed then and raised her beer can. 'Here's to you and me, Johnny.' She tilted the can to her lips, then stood up and stretched luxuriously. 'I'm going swimming. How about you?'

"He did not answer, but turned and stared at her in bewilderment.

"Nym kicked the sandals from her feet, then very deliberately she undid the catch at the side of her shorts. Looking Johnny straight in the eye, she dropped the small black garment. It fell about her

ankles and she stepped free. Now, for all the coverage her shirt and transparent panties gave her, she might as well have been naked.

"Johnny took a step toward her, but controlled himself, his eyes sweeping over her half-veiled body and his sun-tanned face slowly contorting into a mask of raging desire.

"Beautiful and dark, as she stood before him, she untied the knot in her shirt and shrugged out of it, deliberately letting her breasts dance with the movement. She saw that Johnny had begun to tremble. She turned her back on him and felt his eyes on her rounded hips where they gleamed through the panties. She walked to the bow of the boat and then turned toward him, her fingers at the waistband of the panties.

"'All the way, Johnny,' she cried gaily and slid the garment down along her legs and off. She straightened up and let him have a good look.

"Then suddenly she plunged into the water.

"Nym swam quickly away from the boat toward a sandbar that protruded above the surface some three hundred feet away. The cool water felt soothing and wonderfully relaxing as it flowed along her naked body. She rolled over once or twice, the skin of her breasts, taut with the cold, gleaming momentarily in the foam that surrounded her. During one of her turns, she saw Johnny's nude body describe a swift arc through the air from the top of the cabin. He hit the water with hardly a splash, and she turned and began to swim in earnest.

"As the sandbar drew nearer and nearer, she heard the laboring, swishing sound of Johnny as he began to gain on her.

"The chase was fraught with excitement and she redoubled her efforts. When she felt the sand under her feet, she plunged forward toward the little island. When the water only came to her knees, she started running, laughing and remembering the other time when Johnny had chased her. When the water was only up to her ankles he caught her and flung himself at her. Together they went down and rolled over and over, their nude bodies half-submerged in the cool water.

"Then Johnny had a tight grip upon her and she lay still, panting, her breasts rising and falling with the effort, the gleaming water rolling from them in little jewel-like droplets. Johnny, lying on one elbow, looked down at her, his eyes wild and his face contorted with desire. Nym found that she was surprisingly pleased at the feel of his tense body as it lay close to her.

"Then he flung himself against her and his lips found her breasts, and when his hand touched her she cried out and arched her body frantically out of the water. Then she sought him herself and found him and suddenly the world seemed to be obliterated in seething foam and the love of a man for the first time in her life gave Nym complete fulfillment.

"Later they swam back to the boat and climbed aboard. They did not put their clothes back on, but dried themselves off and opened more beer. Entering the little cabin, Nym streched out on one of the bunks and Johnny sat on its edge, his eyes caressing her glorious body.

"She ran her hand across his chest. 'Come and stay with me tonight, Johnny,' she whispered.

"'I . . . . I can't, Nym. We shouldn't have done this.'

"Her hand followed its relentless course and she saw his mouth begin to twitch. 'Tonight?' she repeated.

"He fell upon his knees beside the bunk and started to caress her with his mouth. His lips slid over her breasts, teasing them into taut attention, and soon their breaths were labored again and his mouth vended its maddening way along her flesh, leaving kisses in its wake. Then she tensed furiously and her hands, white-knuckled, caught the edges of the bunk and little sobbing moans sounded from deep in her throat.

"Suddenly she caught him by the hair and bent his head back until the tendons in his neck stood out like knotted ropes. 'Tonight,' she gritted. '*Tonight!*'

"When she let go, he fell forward, his face buried in her breasts. 'I love you, I've always loved you, I love you I love you I love you,' he babbled."

7. Sex acts between Nym Bardolph and her female secretary Lynn, also with Johnny Martel (pp. 109-111):

"As she was fixing the drinks, she heard Lynn behind her.

"'I'm so miserable, Nym. So miserable.'

"'This morning you were happy.'

"'But I thought you loved me then.'

"'Now don't you start that again, you hear?'"

"'I mean it, Nym. If . . . if I thought you didn't love me now after . . . after . . . well, after this morning, I don't know what I'd do I'd . . . I might even kill you!'

"Nym laughed and returned to the girl with two shots of neat whiskey. 'Here, drink this. It'll calm the killer instinct in you.'

"They both lifted the glasses, closed their eyes and gulped the burning liquid. Nym took the glass from Lynn and set both on the coffee table, then she came back to stand directly in front of the girl. She put out both hands and ruffled the blonde hair gently. 'You mustn't get so upset about this, Lynn.'

"The girl's fingers came out and curled about Nym's rounded nude thighs below the black shorts.

"Nym felt the pointed nails digging into her skin. A shudder ran through her.

'Lynn's voice was choked as she spoke softly and intensely. 'I'll never let you go now, Nym. Never!' She dropped to her knees and pressed her face against Nym's flesh.

"Nym tried to pull back. She thought of Johnny, who might arrive at any time. He must not find her like this. 'Not now, Lynn,' she breathed. 'Not now. You must go.'

"'No, no, no, no, no, no . . .' The girl sounded hysterical.

"And then Nym felt her fingers tugging at the fastening of her waistband. It came undone and the shorts dropped to the floor. Before she could do anything about it the sheer panties followed and suddenly it was as if an electric shock went through

her. For a brief moment she tried to remain upright, but then her knees gave way under her and she crumpled to the floor.

"Now she no longer cared. Frantic fingers fumbled with buttons and snaps, with elastic and rustling silk, and then there was nothing between them, and Nym writhed under the ministrations of the little blonde girl to who she herself had taught the art that very morning.

* * * * * * * *

"Later that night, much later, Nym left Johnny sleeping and went down into the living room. She walked slowly to the bar and poured herself a drink.

"She was nude, and as she sat on one of the barstools she regarded herself in the huge mirror that adorned the wall over the fireplace at the end of the room. She was a not unpleasing spectacle and—somewhat tiredly—she smiled at her own image.

"*Little girl, you've had a busy day.*"

8. A sex act between Johnny Martel and Mickey Stanton (pp. 117-119):

"She came to him then and plunked herself on his lap and put her mouth against his. Her little pointed tongue parted his lips and caressed them enticingly. After a while she began to squirm ever so slightly and her breath came more rapidly. Her sharp nails scratched at the back of his neck and finally she took one of his hands and placed it against her breast.

"Johnny felt the familiar full firmness without experiencing any reaction at all. His hand rested inactively against the breast.

"'Don't you want to, Johnny?' she whispered against his mouth.

"'Not right now, Mickey.'

"He could feel her lips forming a smile, and she murmured, 'You're getting old.' Suddenly she slid from his lap to the floor, her avid fingers searching and fumbling. 'You *are* getting old.' She raised her face in astonishment."

* * * * * * * *

"He turned toward the girl, who was still sitting on the floor. 'Mickey,' he began, 'I . . . . ' But he could not say it. He went to her, and kneeling on the floor beside her, he kissed her long and hard. And after a while he made the love to her that she demanded."

9. A sex act between Johnny Martel and Mickey Stanton (pp. 128-129):

"'Come with Mickey,' she said softly. 'Come with Mickey. She'll make you feel better.'

"He was astonished at the compassion in her voice. How much did she suspect? How much did she know?

"Regardless of what Mickey suspected or knew or felt, her love for Johnny was not dead entirely, and in the manner of women, she knew a way to give him at least momentary peace. She led him into his own bedroom, where the late afternoon sun was slanting its rays through the venetian blinds. She brought him to the bed and undressed him as if he were a child and looked down at his still, unhappy face.

"Then slowly she began to undress. She unzipped the side of her cotton dress and pulled it over her head. It was followed by the slip and she stood revealed in pale green bra and panties. Her sheer stockings were held high on her full thighs by a garterbelt, worn under the panties.

"She unsnapped the strap of the brassiere and shrugged it from her shoulders and her full breasts swung free; their pink eyes crinkled and dormant against the white, white skin. She rolled the panties from her soft, richly curved hips and then leaned over Johnny, her breasts swinging gently with the movement. She twisted her torso in a small, writhing movement and he felt the point of a soft and fragrant globe slide caressingly over his cheek.

"'Shall I leave the rest on—the way you've always liked it best?' she asked softly.

"Johnny's face was smothered in her quivering flesh as he sucked the scent of her into his lungs. His fingers began to explore her, and little by little the painful imagery of evil was blotted from his mind.

"Mickey began gently to push him out of the way and gradually he eased his body over until he was lying in the center of the bed. She knelt on the cover beside him, crouched over, and the last thing she said was, 'There, you're not too old, after all.'

"Then her speech was replaced by little animal groans and Johnny soared off into that ecstacy which alone can cure all pain.

"When it came to love, Mickey Stanton was a shameless woman."

10. Sex acts between Nym Bardolph and Tiny Gordon's "boys" (pp. 163-167):

"The devil reached out, and calmly taking his time, slipped the jacket off her shoulders. It slid backward along her arms and fell over her wrists, hanging down to the floor behind her. Then he proceeded methodically to unbutton her blouse. Eventually it followed the jacket, and suddenly she felt the two garments being released from her wrists with the aid of a slitting jackknife.

"The pig spoke from behind her. He had a hoarse, strained voice, as though he could hardly control his excitement. 'Let's do it slow. Take the skirt next.'

"The devil said, 'Any time you change your mind, ma'am, just nod your head and we'll quit right then.'

"'I hope she doesn't,' said the pig, and his voice seemed to be licking its lips.

"The devil's hands went to the waistband of her skirt.

"Nym tried to knee him in the groin, but he spun out of the way in time. His hand struck her a stinging blow across the cheek. 'Please don't do that, Mrs. O'Sullivan,' he said politely.

"She felt a leg go around her own legs from behind, and figuring that the pig-mask was standing on one leg, she tried to throw her weight forward to fling him off balance. If she could get free for just a moment, she could run out the front door and try to throw herself on the mercy of some passing motorist. Then she remembered her bound wrists. How was she going to open a door?

"She did not succeed in throwing the man behind her off balance and she heard him chuckle softly, breathlessly. Then her waistband was undone and the skirt dropped about her feet. Her half-slip followed.

"She was standing before the two men in the pale yellow brassiere and panties which were Sean's favorites and which she had put on for his benefit.

" 'Your're a very beautiful woman,' said the devil softly. 'I wonder what you will look like without this.' And he reached out suddenly and literally tore the brassiere from her breasts. The full, quivering globes sprang into view and she heard the convlusive intake of breath as the men saw them.

" 'It's a sin, Mrs. O'Sullivan, to do this to such a beautiful woman. Please sign and don't force us any further.'

"The pig grunted, 'Don't urge her, you. You wanna stop the fun?'

" 'Tiny won't think it is fun if we have to go back and tell him how far we had to go. He won't be able to sleep for nights and nights.'

" 'Ah, the hell with that. Get on with the business at hand.'

" 'Mrs. O'Sullivan?' It was a polite query.

"Nym shook her head.

"Then suddenly the panties were ripped from her body with one violent sweep and she stood completely revealed in the soft light.

"And then the devil-mask was no longer polite. Nym, her whole being pulsing with horror, her knees giving way under her until she was held upright only by the strength of the man behind her, heard his

harsh breath as it whined its labored way through a passion-constricted throat. She felt his hand obscenely caressing her helplessly exposed body and for once she cursed the effect her body had on men.

"She felt her torso being arched inexorably backward until she formed a tense, taut bow, completely subject to the freely roving hands.

"And now the devil-mask no longer pleaded with her to sign. Without another word he struck her with horrible accuracy in the chest and a horrid shriek rose in Nym's throat only to be stopped by the tape that bound her lips. Again and again he struck, his blows raining all over her exposed body with methodical thoroughness.

"She felt herself thrown on the couch and in a red haze of dreadful pain she bucked and leaped under the stinging lash of the beating, no sound coming from her throat though she was screaming inside.

"Finally, mercifully, she began to black out. When the men became aware of her growing limpness, they ceased their merciless work. And suddenly she felt herself turned onto her back and a glass of ice-cold water was thrown in her face. The freezing liquid revived her and she became again aware of the horrible fire in her back. It felt as though it had been flayed of skin and she was lying on her own raw, red flesh.

"'Now?' the pig-face asked eagerly, like a comedian in a vaudeville show.

"'Now.' The answer was laconic.

"She felt herself lifted and carried into the bedroom. Whoever was carrying her laid her gently on the bed.

"'Me first?'

"'Okay, but let's get this over with. I'm not enjoying it much.

"'I am.'

"And then she felt the lips and the hands and the male body and after a little while the pain seemed to become a welcome thing and she rolled her body frantically and silently as they took her.

"Again and again. . . ."

VI.

There Is No Constitutional Requirement That Knowledge of the Obscene Character of the Book Be an Element of the Offense.

Section 41.01.1 of the Los Angeles Municipal Code [R. 10, Appellant's Brief, Appx. "A"] is a law prohibiting the possession by any person of obscene material at certain designated places. It is not a pre-censorship law nor does it attempt to prohibit mere possession of obscene material under all circumstances. It is applicable to persons who have in their possession obscene material at a school, school grounds, public park or playground, or any public area within 300 yards of such a place. It is applicable to any person possessing obscene material in a place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or post cards are sold or kept for sale. It is applicable to any person possessing obscene material in a toilet or restroom open to the public; in a pool room, in a place where alcoholic liquor is sold or offered for sale to the public, or in a place where phonograph records, photographs, motion pictures, or transcriptions are made, used, maintained, sold or exhibited. Thus included within its terms are a multitude of possible violators, from the

hawker of obscenity to school children at or about their schools and places of retreat, through the restroom degenerate up to and including an otherwise legitimate business man.

Appellant herein, convicted under such ordinance, happens to be a book merchant, maintaining he had no knowledge of the character of the book *Sweeter Than Life*, when it was sold. Section 41.01.1 of the Los Angeles Municipal Code contains no requirement of knowledge, and the absence of such an element is not a violation of any constitutional guarantees either on the face of the ordinance or in its application to appellant.

As stated by the Appellate Department of the Superior Court in the opinion in this case, a book seller may be constitutionally prohibited from possessing an obscene book in his store though it is not shown that he knows its obscene character or intends its sale. This follows the rule as stated in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 964: (178 P. 2d 853)

> "No doubt the legislature could, on the reasoning which justifies the pure food and other similar laws, adopt a statute prohibiting the sale of obscene books regardless of the knowledge of their character or without any specific intent."

As to such pure food laws the courts have long held in such cases as *People v. Schwartz* (Cal., 1937), 28 Cal. App. 2d Supp. 775, 70 P. 2d 1017; *State v. Huber* (Del., 1913), 4 Boyce 259, 88 Atl. 453; *Weigand v. District of Columbia* (Dist. of Col., 1903), 22 App. D. C. 550, 572; *Meigs v. State* (Fla., 1927), 94 Fla. 809, 114 So. 448; *Groff v. State* (Ind., 1908), 171 Ind. 547, 85 N. E. 769; *New Orleans v. Vinci* (La., 1922), 153 La. 528, 96 So. 110; *State v. Rogers* (Me., 1901), 95 Me. 94, 49 Atl. 564;

Comm. v. Graustein & Co. (Mass., 1911), 209 Mass. 38, 95 N. E. 97; *People v. Kibler* (N. Y., 1887), 106 N. Y. 321; 12 N. E. 795, that one undertaking to sell food assumes the responsibility of selling pure food, and having entered such a business, the law will not permit him to evade his responsibility to the public by pleading ignorance of the quality or contents of that which he may lawfully sell only if pure, for consumption by the human body.

"In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."

United States v. Dotterweich, 320 U. S. 277, 281, 64 S. Ct. 134, 88 L. Ed. 48, 51.

"It is the universal rule that it is within the power of the legislature to declare an act criminal, irrespective of the knowledge of the doer that the facts exist which make the act unlawful. (*People v. McClennegan*, 195 Cal. 445, 468; 22 C. J. S. 85, sec. 30; 14 Am. Jur. 768, sec. 16.)

"Whether knowledge of the facts is a necessary element of a statutory offense is a matter of construction to be determined by considering the subject matter of the statute, its language, the evil sought to be eradicated, its manifest purpose and design, and the consequences of the several constructions to which the statute may be susceptible."

People v. Daniels, 118 Cal. App. 2d 340, 343, 257 P. 2d 1038.

"In the interest of the public, the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute."

People v. McClennegan, supra.

"While the general rule at common law was that scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes, even where the statutory definition did not in terms include it, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.

"It is a question of legislative intent, to be construed by the court. It has been objected that punishment of a person for an act in violation of law, when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in *Shevlin Carpenter Co. v. Minnesota*, 218 U. S. 57, 69, 70, 54 L. ed. 930, 935, 936, 30 Sup. Ct. Rep. 663, in which it was held that in the prohibition or punishment of particular acts, the state may, in the maintenance of a public policy, provide 'that he who shall do them, at his peril, and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes . . ."

United States v. Balint, 258 U. S. 250, 42 S. Ct. Rep. 301, 66 L. Ed. 604.

"The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot we think, be questioned. . . .

"As there is an undoubted competency in the lawmaker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature and to enforce the law in absolute conformity with the legislature. . . .

"Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owners and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril."

Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 31 S. Ct. 512, 55 L. Ed. 582.

"A man's fate often depends . . . . on far greater risks that he will estimate 'rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.' *Nash v. United States*, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 S. Ct. 780. The objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law, has more than once been overruled. In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State in punishing particular acts may provide that 'he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime."

Williams v. North Carolina, 325 U. S. 226, 238, 65 S. Ct. 1092, 89 L. Ed. 1577, 1580, citing *United States v. Balint* and *Sherlin-Carpenter Co. v. Minnesota, supra.*

VII.

The Rejection of Appellant's Purported Expert Witnesses Did Not Deprive Appellant of Any Constitutional Protection.

The rejection of the testimony of purported expert witnesses by the trial court was approved by the Appellate Department of the Superior Court in this case, under the California rule of *People v. Wepplo, supra*, 78 Cal. App. 2d Supp. 950, 178 P. 2d 853, in which case the court stated:

"If the book sold by defendants was in fact obscene, judged by its contents, it would not become

any less so because other book dealers were selling it, or that the public library had copies of it, or literary critics praised it as a work of literary merit, or because other books equally bad were being openly sold. (See *Commonwealth v. Isenstadt*, supra, at pp. 846, 848, 849 of 62 N. E. 2d for discussion of some of these matters.) The fact that a book has literary merit does not prevent it from being obscene, if otherwise it has that character. (*Halsey v. New York Soc. for Suppression of Vice* (1922), 234 N. Y. 1 (136 N. E. 219); *Commonwealth v. Buckley* (1909), 200 Mass. 346 (86 N. E. 910), 128 Am. St. Rep. 425, 22 L. R. A. N. S. 225.) It does not appear that the critics whose opinions were offered discussed the question of obscenity, but if they had done so it would have been proper to exclude the opinions because this was the very issue to be decided by the jury. (32 C. J. S. 74; *Gardenswartz v. Equitable, etc. Soc.* (1937), 23 Cal. App. 2d 745, 753 (68 P. 2d 322); *People v. Crossan* (1927), 87 Cal. App. 5, 16 (261 P. 531).)"

If the subject under inquiry is within the common experience of men in the ordinary walks of life, or may be ascertained by the ordinary use of the senses of a non-expert, there is no room for expert evidence.

People v. Durant, 116 Cal. 179, 48 Pac. 75;

Barham v. Wilding, 210 Cal. 200, 291 Pac. 173.

Expert testimony is admissible or not dependent upon whether the subject matter is within common experience or whether it is a special field where the opinion of one

of skill and experience will be of greater validity than that of the ordinary juryman.

Zelayeta v. Pacific Greyhound Lines, 104 Cal. App. 2d 716, 232 P. 2d 572.

This question was discussed by Mr. Justice Harlan in his separate opinion, concurring with the prevailing opinion affirming the judgment of the Appellate Department of the Superior Court in *Alberts v. California:*

"The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to be clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce to a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. In fact the very division of opinion on the subject counsels us to respect the choice made by the State."

Roth v. United States;

Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498.

VIII.

A Proper Test for Obscenity Was Utilized in Determining the Character of the Book Sweeter Than Life.

The California courts, in defining obscenity, have held that a book is obscene:

> "'. . . if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.' (*Commonwealth v. Isenstadt* (1945), 318 Mass. 543 [62 N. E. 2d 840, 844]; see also, *United States v. Dennett* (1930), 39 F. 2d 564, 568; *Dunlop v. United States* (1897), 165 U. S. 486, 501 [17 S. ct. 375, 41 L. ed. 799, 804].)"
>
> *People v. Wepplo, supra*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853.

The opinion of the Appellate Department in this case stated:

> "We have found the book in question is obscene, not merely that there is sufficient evidence to support the trial court to that effect, keeping in mind what we said in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 961, in which obscenity was defined in construing Cal. Penal Code sec. 311 (3)." [R. 12.]

Also that:

> "Under any test, the book concerned in this prosecution was properly held to be obscene by the trial court, and we share such a conclusion upon our independent view of the evidence . . ." [R. 10.]

This court in *Roth v. United States, Alberts v. California*, 354 U. S. 476, 489, 77 S. Ct. 1304, 1 L. ed. 2d 1498, 1510, has accepted the California test of *People v. Wepplo, supra*.

There is nothing in the opinion of the Appellate Department of the Superior Court to indicate that the trial court used any but the California test of obscenity, and any remarks of the trial court, cited by appellant, had no affect on the validity of its judgment under California law, in that:

> "The remarks of a trial judge made in the course of deciding a case whether written or oral are of no concern on appeal. He might repeatedly announce contrary observations in his discussion, but that which spells triumph or defeat is the content of the judgment entered. The appeal is based on the record, which excludes all comments of the court made in deriving its conclusion."
>
> *People v. Lindsey*, 90 Cal. App. 2d 558, 564, (203 P. 2d 572) citing *People v. Grana*, 1 Cal. 2d 565, (36 P. 2d 640)

IX.
Conclusion.

By competent evidence and an accepted test of obscenity appellant was convicted under an ordinance constituting a valid exercise of the police power on its face and as applied. In that the book *Sweeter Than Life* is obscene he has suffered no violation of his constitutional guarantees of freedom of speech and press.

The judgment should be affirmed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney.
PHILIP E. GREY,
Assistant City Attorney.
WILLIAM E. DORAN,
Deputy City Attorney.

IN THE

Supreme Court of the United States

October Term 1959.

No. 9

ELEAZAR SMITH,

Petitioner

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

BRIEF, AMICUS CURIAE, OF THE AMERICAN CIVIL LIBERTIES UNION

SUBJECT INDEX

PAGE

Interest of amicus curiae 1

Preliminary statement 2

Argument 3

I.

Obscenity, unless it constitutes an incitement to anti-social conduct, is not excluded from the protection of the First and Fourteenth Amendments 3

II.

The book "Sexual Behavior in the Human Female" is not obscene under the tests enunciated in the Roth-Alberts Opinion 9

A. The book is not obscene because it will not incite anti-social behavior 9

B. Even if the book is found to appeal to the prurient interest of the average person, it does not as a whole constitute the work subject to 10

Conclusion 12

Appendix: Weekly circulation figures covering the fiction department of the Los Angeles Public Library ..... App. p. 1

IN THE

Supreme Court of the United States

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THE PEOPLE OF THE STATE OF CALIFORNIA,

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California and Nationally are organizations dedicated to the preservation and extension of the freedoms protected by the Bill of Rights of the United States Constitution. The decision of the court below in the instant case appears to us to be an unwarranted abridgement of the right to freedom of expression. Accordingly, this *amicus curiae* brief is filed.

The Consent of the parties accompanies the original of this brief.

Preliminary Statement.

This brief will be limited to a consideration of the constitutional status of that most evanescent of concepts, obscenity, as applied by the trial court. No attempt will be made to deal with a related but separate issue presented by the present appeal, *i. e.*, the failure of Sec. 41.01.1 of the Los Angeles Municipal Code to require knowledge or intent as an element of the crime proscribed. We do not explore this issue, even though we regard it as of fundamental importance in the present case, because we believe that appellant in his brief has fully set forth the important principles applicable thereto. Therefore, as to the lack of scienter in the ordinance in question (the importance of which is most effectively pointed up in the concurring opinion of Mr. Chief Justice Warren in *Roth-Alberts v. United States*, 354 U. S. 476), we wish merely to adopt and support the position taken in the appellant's brief.

ARGUMENT.

I.

Obscenity, Unless It Constitutes an Incitement to Anti-Social Conduct, Is Not Excluded From the Protection of the First and Fourteenth Amendments.

content, sexual immorality." Again sexual immorality and obscenity are equated in a context where sexual immorality is said to require incitement.

The rule thus enunciated in *Kingsley* is not only consistent with, but is indeed required by the high standard hereto-fore adopted by this Court in keeping open the channels of communication as a fundamental concomitant of our theory of democracy. This Court acted in continuity with its best traditions when in *Kingsley* it quoted Mr. Justice Brandeis' famous statement in *Whitney v. California*, 274 U. S. 357 at 376 that advocacy of conduct proscribed by law is not

> "a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon."

Ideas or advocacy of conduct short of incitement can not be proscribed to a greater extent in the area of sex than in any other area of concern to our citizens. Surely

more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

It is apparent from the record that the State was not held to the burden of establishing and in fact did not establish that reading the book, "Sweeter Than Life," would incite a reader to illegal or anti-social conduct. For this reason alone the judgment below may not stand since without such proof of inherent governmental restriction of free expression must violate the guarantees of the First and Fourteenth Amendments. It is interesting to note that the trial judge made some attempt to apply the standard of incitement to anti-social conduct, but in doing so quite fallaciously confused the issue of whether a person would be incited to anti-social conduct by *reading a book* with the issue of whether a person would be incited to anti-social conduct if in fact subjected to the *[illegible]* encountered by one of the characters in the book. Thus the Judge stated [R. pp. 81 82]

"If you have read the book, sir, you observed the young woman in that case was so perfectly normal

> [illegible] and [illegible] the experience [illegible] perfectly abnormal woman. Now, it is [illegible] normal mind, that kind of [illegible] illegitimate. And we [illegible] have had many cases of [illegible] with this and we do know that a perfectly normal person, that on certain occasions, being subjected to certain things, becomes changed and altered. Now, I have heard this story. I have heard it so many times when I have been in a position as a Public Defender and I have represented them and I said: "How did you get that way?" and had the same story repeated time after time, being subjected to it. It is like intoxicating liquor. It affects some that are otherwise perfectly normal until the experience. And that book there, I thought, was a perfect illustration of a normal person, one whose thoughts were entirely different, had never entered upon that field, upon being subjected to it forcibly became an entirely altered person. *(The book, I thought, carried the same point,* emphasis added.)

The Court thus recognized from the premise that a woman subjected to a homosexual advance would be inclined to become a lesbian. The court also held that this in some way constitutes proof that the reading of such an explicit will likely [illegible] a normal person to such conduct. Upon assuming [illegible]

II.

The Book "Sweeter Than Life" Is Not Obscene Under the Tests Enunciated in the Roth-Alberts Opinion.

Even if this Court were not to adopt the position set forth in Argument I, *supra*, it would still follow that the Court below violated the guarantees of the First and Fourteenth Amendments since the work in question is not obscene under any accepted standard.

A. The Work in Question Is Not Without Redeeming Social Importance.

In the *Roth-Alberts* opinion this Court found that works are obscene and therefore outside the protection of the First Amendment only if having as their dominant theme according to the suggested definition they are "utterly without redeeming social importance." It is not our intention to pass upon the literary merits of the work and it is not here suggested that the book, "Sweeter Than Life," constitutes a work of major literary importance, nor even that it is particularly well written. For the purposes of this argument such considerations are of no importance since it is manifest that the protection of the First and Fourteenth Amendments is not limited to persons of literary skill. Yet a fair reading of the book must lead to the conclusion that it is not utterly without redeeming social importance. The theme of the book is in fact a moralistic pronouncement, the text of which is summarized in the quotation from Juvenal's Satires in the frontispiece: "Revenge is sweeter than life itself. So think I." This theme from which the title of the work is taken is central to the entire story. The book quite simply is the story of Nym Rudolph Sullivan who devotes her entire life to seeking revenge against men all men instead of the determined wrongs of her youth. The objective of revenge is

to Nym sweeter than life itself, and, true to the *Juvenal dictum*, Nym is proven a fool (and indeed is murdered) for having pursued such a false standard of values. This can in no sense be regarded as "dirt for dirt's sake," nor can it be characterized as pornography (See *Kingsley Pictures Corp. v. Regents, supra*, wherein this Court treats as embracing a single concept the words, "obscenity" and "pornography"). The scenes in the book depicting sexual acts are not as vividly nor as frankly portrayed as those in many a literary "best seller." Compare for example sex scenes in "Peyton Place" by Grace Metalious and in "By Love Possessed" by James Gould Cozzens. Moreover, the treatment of sex in "Sweeter Than Life," is not nearly as explicit as such treatment in "Ulysses" (held not obscene in *United States v. One Book Called "Ulysses"*, 5 Fed. Supp. 182, affd. 72 F. 2d 705) or in the book, "Lady Chatterley's Lover," (held not obscene in *Grove Press v. Christianberry*, U. S. D. C. S. D. N. Y. No. 147-187 (1959 unreported)).

B. Even if the Book Appealed to the Prurient Interest of Lesbians This Would Not in Itself Constitute the Work Obscene.

Since Judge Woolsey's famous opinion in the "Ulysses" case, the courts have recognized that the obscenity of a work is to be determined by measuring the reaction of normal members of the community—not children or abnormal persons. Thus Judge Woolsey stated (5 Fed. Supp. at 182):

> "Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal

> inquiry, the same role of hypothetical reagent as does the 'reasonable man' in the law of torts and 'the man learned in the art' on questions of invention in patent law. . . . It is only with the normal person that the law is concerned. . . ."

In applying this standard to a work dealing with homosexuals it must be established not merely that the work will appeal to the prurient interest of readers who are themselves homosexual (including lesbians), but that it will further appeal to such interests of normal members of the community. It is obvious that the prurient interest of normal persons will be much more readily aroused by material dealing with heterosexual rather than homosexual relationships. Therefore, a work dealing with homosexuality must carry an even greater burden to establish obscenity. This is most recently illustrated and confirmed in this Court's reversal of a holding that certain articles dealing with lesbians and other homosexuals were obscene. *One, Incorporated v. Olesen*, 355 U. S. 371 (1958). This notwithstanding the statement of the Court of Appeals for the Ninth Circuit in the *One* case that the lesbian article "is nothing more than cheap pornography calculated to promote lesbianism" (241 F. 2d 772, 777). The treatment of lesbians in works of fiction had become a frequent form of literary expression. (See Appendix for list of works dealing with lesbians carried in the Fiction Department of the Los Angeles Public Library.) Such works have undoubtedly contributed to the public understanding of this social problem. Free expression in this field as well as in others must not be curtailed by misguided guardians of the public morals. Mr. Justice Brandeis, speaking of wire tapping

in *Olmstead v. United States*, 277 U. S. 437, 479, might well have had reference to the issues presently before this Court when he stated:

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Conclusion.

The judgment below should be reversed.

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Melville B. Nimmer,
Rowland Watts,
Attorneys for Amicus Curiae.

APPENDIX.

Works Dealing With Lessons Carried in the Fiction Department of the Los Angeles Public Library.

Baker, D.	TRIO	1943
Barnes, D.	NIGHTWOOD	
Bertin, Celia	THE LAST INNOCENCE	1955
Brinig, M.	YOU AND I	1945
Busch, N.	DAY OF THE CONQUERORS	1946
Bussy, D.	OLIVIA	1949
Cela, C.	THE HIVE	1953
Davey, W.	DAWN BREAKS THE HEART	1941
Eichradt, J.	NADIA DEVEREUX	
Gielgud, V.	CAT	1957
Hall, R.	WELL OF LONELINESS	1932
Jackson, S.	HANGSAMAN	1951
Kormendi, F.	THE HAPPY GENERATION	1949
Kramer, N. M.	THE HEARTH AND THE STRANGENESS	1956
MacKenzie, C.	EXTRAORDINARY WOMEN	1928
Mallet, E.	THE ILLUSIONIST	1952
MacRae, K.	NIKKI	1955
Murphy, E.	MADEMOISELLE LAVALLIERES	1948
Proust, M.	CAPTIVE	1930
Schmidt, G.	ALEXANDRA	1947
Sicket, P.	SUCH AS WE	1948
Sinclair, J.	WASTELAND	1946
Wetherell, J.	RUN, SHEEP RUN	1947
Wilhelm, G.	TORCHLIGHT TO VALHALLA	1938
Wilhelm, G.	WE TOO ARE DRIFTING	1940
Willis, G.	LITTLE BOY BLUES	1947

SUBJECT INDEX

PAGE

Summary of argument 2

1. The Supreme Court has misconstrued the basis of the judgment below 2
2. The question is of utmost importance 4
3. The burden, if any, on the book seller is not unreasonable 5
4. The decision if allowed to stand leaves law enforcement against obscene books in a chaotic state 10
5. Due process under the Fourteenth Amendment does not properly include the new guarantees given to the appellant 11
6. The constitutional right of "free speech" has no application under the circumstances here involved 13
7. Free speech cannot be here involved in view of the copyright 16

Conclusion 20

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Alberts v. California, 354 U. S. 476	13
Boyle v. Barrett, 344 U. S. 583	15
Brown v. Board of Topeka, 347 U. S. 483	9
Cantwell v. Connecticut, 310 U. S. 296	7, 13
Carlson v. California, 310 U. S. 106	14
Chaplinsky v. New Hampshire, 315 U. S. 568	7, 12
Erie Ry. Co. v. Tompkins, 304 U. S. 64	12
Feiner v. New York, 340 U. S. 315	7
Fox Film Corp. v. Doyal, 286 U. S. 123	17
Frank L. Young Co. v. McNeal-Edwards Co., 283 U. S. 308	15
Hague v. C. I. O., 307 U. S. 496	14
Homeford v. Silas Mason Co., 300 U. S. 577	15
Herndon v. Lowery, 301 U. S. 242	14
Malinski v. New York, 324 U. S. 401	13
Murdock v. Pennsylvania, 319 U. S. 105	14
Reynolds v. United States, 98 U. S. 145	7
Robertson v. Baldwin, 165 U. S. 275	8
Rochin v. California, 342 U. S. 165	12
Roth v. United States, 354 U. S. 476	7, 13
Saia v. New York, 334 U. S. 558	7
Schneider v. Irvington, 308 U. S. 147	14
Schneider v. State, 308 U. S. 146	7
Snyder v. Massachusetts, 291 U. S. 97	12
Sweezy v. New Hampshire, 354 U. S. 234	14
Taylor v. Mississippi, 319 U. S. 583	14
United States v. Ayers, 338 U. S. 680	7
Watkins v. United States, 354 U. S. 178	14

Statutes

California Penal Code, Sec. 311	3
United States Constitution, First Amendment	1
United States Constitution, Fourteenth Amendment	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 519

ELEAZAR SMITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

PETITION FOR REHEARING.

Comes Now the above-named appellee, The People of the State of California, and petitions for a rehearing of the above-entitled cause upon the following grounds:

1. The Court has misconstrued the basis of the judgment below in that the Court erroneously holds that scienter is not an element of the offense for which appellant was convicted.

2. The decision extends the constitutional right of "free speech" to circumstances under which it properly has no application.

3. The decision, if allowed to stand, leaves the important matter of protecting the public against obscene books in a chaotic state.

4. The decision extends the guarantees of the First and Fourteenth Amendments beyond all precedent and reason and creates an irreconcilable conflict between the protection of free speech and the restrictive property right in copyrighted material.

Summary of Argument.

The Court has misconstrued the basis of the judgment below in that the Court erroneously holds that scienter is not an element of the offense, whereas the lower court, in effect, held that the ordinance by specifying the circumstances of the offense created a presumption of constructive knowledge (notice) on the part of a bookseller as to what he has in his stock in trade. Such a presumption is a reasonable one and is for the State to prescribe, and the facts of this case prove it. Protection of the public against obscene books is an important matter and the present state of the decision leaves the matter in a chaotic state. Finally, the decision, if allowed to stand, extends the guarantees of the First and Fourteenth Amendments beyond all precedent and reason and creates an irreconcilable conflict between the protection of free speech and the restrictive property right in copyrighted material.

1. The Supreme Court Has Misconstrued the Basis of the Judgment Below.

It is to be noted at the outset, as pointed out in the opinion of the Court, that the statutory crime here involved is a violation of an ordinance making it a misdemeanor "for any person to have in his possession any obscene or indecent * * * book * * * in any place of business where * * * books * * * are sold or kept for sale."

While under the terms of the ordinance the prosecution is not required to prove scienter by the introduction of evidence in order to establish the guilt of a book-seller who has obscene matter on his shelves, this does not mean that the element of scienter is eliminated as an element of the offense. The element of scienter is furnished under the restricted circumstances of the offense as de-

fined by the ordinance itself. Under the terms of the ordinance a bookseller has constructive knowledge (notice) of that what he carries as his stock in trade. Scienter follows as a matter of law by way of statutory presumption of knowledge, which is what was held in effect by the California courts, and is a presumption clearly within the power of the state to create.

The opinion of the Court delivered by Mr. Justice Brennan states at the outset that the offense was defined by the lower courts

> "as consisting solely of the possession, in the appellant's bookstore, of a certain book found upon judicial investigation to be obscene" and that "the definition included no element of scienter—knowledge by appellant of the contents of the book—and thus the ordinance was construed as imposing a 'strict' or 'absolute' criminal liability."

It is respectfully submitted that this is not a correct statement of the basis of the judgment below. What the Appellate Department of the Superior Court held was that the scienter was established as a presumption in the ordinance itself and that this was predicated upon a reasonable basis. The problem confronting the Superior Court was the possible conflict between the City ordinance under which appellant was charged and the Penal Code of the State of California. Under Section 311 of the California Penal Code, "Every person who wilfully and lewdly * * * writes * * * sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper or book * * * is guilty of a misdemeanor."

The majority opinion of the Appellate Department of the Superior Court states, "Municipal Code Sec. 41.01.1 is

more restrictive since it eliminates the requirement that a sale be made 'lewdly' and in making it illegal to possess such material in such a place of business, irrespective of a lewd intent to sell it or keep it for sale." [R. 13.] The lower Court did not say that mere possession of an obscene book was a misdemeanor, it required that such possession be in a book store. The Appellate Department was at pains to point out [R. 15] that:

> "Those who are engaged in selling articles of a particular class to the public, have the first and best opportunity to know or be on notice of their characteristics, even though possession and sale is not involved. (Civ. Code secs. 18, 19)."

Actually what the Appellate Department was saying is that possession plus the circumstances or conditions prescribed by the ordinance as a matter of law gives rise to scienter and that this presumption created by the provisions of the ordinance is a reasonable one. This is a far cry from stating that scienter is not included as an element of the offense.

2. The Question Is of Utmost Importance.

Obscenity has in no way lagged in this modern age of efficiency and mass production. The flood tide of obscene books and other publications is of utmost concern to law enforcing agencies and other groups solicitous of the public welfare. What the Court has done in this case is to strike down the barriers erected against this flood of filth and, at the same time, expressly refrain from furnishing any guide by which legislative bodies may determine legally acceptable laws to combat this serious menace to society.

The Court in this case has simply raised the shield of ignorance as a defense against prosecution for the dispensing of obscene books and then leaves the matter in abeyance.

3. The Burden, if Any, on the Book Seller Is Not Unreasonable.

The hard core of the opinion of the Court delivered by Mr. Justice Brennan is that the offense involved, as defined by the lower corts, consists "solely of the possession in the appellant's bookstore of a certain book found upon judicial investigation to be obscene." The opinion states, "But the question here is as to the validity of the ordinance's elimination of the scienter requirement—an elimination which may tend to work a substantial restriction on freedom of speech." The utmost confusion exists over this premium on ignorance, as disclosed by the several opinions rendered in this case.

The opinion of the Court states that,

> "our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."

It must be borne in mind that the ordinance, so far as applicable to the case at bar, is confined in its operation to book stores and that this defendant is a bookseller. Is it not reasonable to presume that a man in the normal course of business has some knowledge of his stock in trade, whether he be in a constitutionally protected field or otherwise? Is not this circumstance alone sufficient

by way of presumption to meet the admitted statement in the opinion of the Court that, "the circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

It is respectfully submitted that on the face of the record and the opinion itself it is error for the Court to say, "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock."

The ordinance here involved establishes an inference in the ordinance itself that a person has knowledge of that which he possesses. It is respectfully submitted that in the case of a bookseller this is not unreasonable. The very nature of the solicitation made by publishers and the descriptive literature upon which the bookseller purchases his stock are reasonably sufficient to establish circumstantially that he knows the contents of his books, at least as far as obscenity is concerned. It is being entirely unrealistic to say that the obscene nature of the book is concealed in the advertisements of the book. As a matter of every day practicality the advertisement of such books is ample to place any reasonable person, including a bookseller, on guard that he may be handling what, in fact, is an obscene book.

The reasonableness of the presumption of knowledge on the part of a bookseller is borne out by the evidence in the case at bar. The record shows the elaborate precautions taken by appellant to keep minors from investigating the contents of his stock in trade [R. 35-37, 40-41.]

In at least one of the five opinions of the Court it is indicated that because a constitutional right is involved

the hands of the State are completely tied, that it is utterly powerless to cope with the problems created by peddlers of pornography. But this has not heretofore been the law. (*Feiner v. New York*, 340 U. S. 315; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Roth v. United States*, 354 U. S. 476; *United States v. Alpers*, 338 U. S. 680; *Saia v. New York*, 334 U. S. 558; *Schneider v. State*, 308 U. S. 146; *Cantwell v. Connecticut*, 310 U. S. 296).

The first right mentioned in the first amendment is that of Freedom of Religion, yet in holding that this did not permit of religious practices contrary to the declared law of the land, despite the contention that what had been done was in the firm belief that it was morally right, and in the exercise of religious practices in which the defendant fully believed, and was, therefore, protected by the first amendment, this Court stated:

> "A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does." (*Reynolds v. United States*, 98 U. S. 145, at 167).

Likewise, in the present case the fact that the Constitution grants the right of free speech does not carry with such right the grant of immunity from state laws to the peddler of pornography, who, by the very existence of the ordinance has been put on notice that if he does sell or have in his store obscene matter he will be held accountable. If, despite this notice, he does possess in his store obscene matter, he is guilty, as "every man is presumed to intend the legitimate consequences of what he knowingly does." Here he "knowingly" placed the obscene book on his shelves. There is no contention that

he "did not know" the book was on his shelves, and the law required that he assume the responsibility of being aware of the contents of the book. As has been shown, and as held by the California courts, it was a reasonable requirement to place such responsibility upon the bookseller.

The second amendment provides in part that, ". . . the right of the people to keep and bear arms shall not be infringed." Certainly the ability to buy and sell arms is a necessary incident to the exercise of such right. Yet it is well established that the State may prohibit the carrying of concealed weapons (*Robertson v. Baldwin,* 165 U. S. 275), or the possession or sale of certain types of arms, such as machine guns. Could the proprietor of a gun shop escape liability for selling unregistered guns, or weapons of a prohibited kind, simply by contending he did not know what was in a box he sold? Certainly not. Yet here it is contended that the proprietor of a book shop may escape liability by denying knowledge of the fact that he possessed or sold a prohibited article, an obscene book. Where is the consistency or logic of this? Are we to say that one clause of one amendment of the Constitution gives an unlimited and unlimitable right; whereas other clauses in the same amendment, and clauses in other amendments, may be intelligently and practically interpreted and applied for the protection of society?

Nor can it be rationalized by contending that weapons are dangerous, but books are not dangerous. It has been well stated that "the pen is mightier than the sword."

Just as there are loaded and unloaded guns, the difference often spelling the difference between life and death,

there are books "loaded" with obscenity which destroy or threaten to destroy the morality of our nation and its richest treasure—our young people.

Would the constitutional right to bear arms render invalid an ordinance or state law making it an offense to have a loaded gun available to customers on the shelves of a gun store without requiring proof of scienter on the part of the proprietor? Should a similar ordinance directed against books "loaded" with obscenity be declared invalid?

It is a well-established fact that obscenity has an evil effect upon some people. Obscenity may well affect their hearts and minds in a way never to be undone. Just as laws with respect to weapons, or against certain religious practices which are contrary to public morality, are necessary only because of some people, but nevertheless valid, just so laws against obscenity are valid even though there are those who would not be adversely affected by obscenity, however prevalent. But laws are not made for the good, nor to protect the strong, laws are to protect the weak from themselves and from others.

Fortunately, it has now been clearly established that "that which affects the hearts and minds of its people is just as much a matter of concern to the State as that which affects their bodies." (*Brown v. Board of Topeka*, 347 U. S. 483, 494).

Just as society can prohibit dope and impure food, which poison the body, society should be able to prohibit obscenity which poisons the heart and mind; just as society must have the power to restrict the possession and sale of weapons so as to protect the bodies of its people, just so society must have the power to restrict

the possession and sale of obscenity so as to protect the hearts and minds of its people. And this is equally true regardless of whether all the people, or only the weak, need such protection.

4. The Decision if Allowed to Stand Leaves Law Enforcement Against Obscene Books in a Chaotic State.

The opinion of the Court delivered by Mr. Justice Brennan declares that, "we need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock."

Mr. Justice Frankfurter in his concurring opinion states that,

> "How much or how little awareness that a book may be found to be obscene sufficies to establish scienter, or what kind of evidence may satisfy the how much or how little, the Court leaves for another day."

Actually, this Court has not said that a state statute or city ordinance may not impose a presumption of law that a bookseller knows the contents of his own book stock. Yet this very question is actually presented on the record in this case. But even on the narrow view of the ordinance taken by the Court, Mr. Justice Frankfurter well sums up the quandary left by the Court's decision, when he states:

> "I submit, invalidating an obscenity statute because a state dispenses altogether with the requirement of scienter does require some indication of the scope and quality of scienter that is required."

The battle against obscenity is no minor problem. Obscenity is big business—the profits are large—the purveyors intelligent and ingenious. The fact that "the brain" and not "the belly" are involved, as observed by Mr. Justice Frankfurter, does not lessen the importance of the problem. The brain is really what is involved in the matter of segregation, yet this Court has been none the less concerned in this field. A warped outlook can arise from obscenity equally as well as from segregation.

It is respectfully submitted that this matter of valid legislation in the field of obscenity should not be thrown blindly back at the legislative branch for them to grope for a solution which, after passing through lower state courts, will eventually years later be passed upon by this Court. The problem is too important and the consequences too grave to leave this field of legislation without some guidepost however vague or indefinite it may be found necessary to make it.

5. Due Process Under the Fourteenth Amendment Does Not Properly Include the New Guarantees Given to the Appellant.

The Opinions of Mr. Justice Frankfurter and Mr. Justice Harlan indicate that certain types of evidence should have been admitted at the trial, to wit: that proof of the common conscience is pertinent and the denial of such proof denies the guaranty of free speech or precludes the accused of his day in court.

It is submitted that these contentions have not and should not be made a part of due process:

> "The refusal of the state court to admit evidence of provocation . . . *is open to no constitutional*

objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine." (*Chaplinsky v. New Hampshire*, 315 U. S. 568.)

Any damage incurred by the exclusion of evidence is not sufficiently palpable to offend the tests used for determining whether or not procedural due process has been violated, that is: the canons of decency and fairness which express the notions of justice of English-speaking peoples (*Rochin v. California* 342 U. S. 165); something so inbred in the traditions and conscience of our people as to be ranked as fundamental. (*Snyder v. Massachusetts*, 291 U. S. 97, 105.)

Furthermore, the mental element or scienter should not be included within the securities granted by due process. An unequivocal pronouncement once came from this Court:—"THERE SHALL BE NO FEDERAL COMMON LAW." (*Erie Ry. Co. v. Tompkins*, 304 U. S. 64.) Since that historical decision, much has been done to render it impotent, through the subterfuge of Due Process. Conspiracy to commit genocide or treason has been given more safeguards and dignity than conspiracies to commit simple murder.

In the case at bar this Court has now determined that scienter is an integral part of Due Process when applied to peddling salacious materials in a bookstore. It is submitted that this has the effect of a judicial fiat, forming another federal common law rule. It must be remembered:

> "We must be deeply mindful of the responsibilities of the states [illegible] enforcement of criminal law and exercise with due humility our merely nega-

tive function in subjecting convictions to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." (*Malinski v. New York*, 324 U. S. 401.)

The quasi-legislative effect of this decision, concededly coupled with the current trend of this Court, tends to derogate this principle. This, we submit, is improper.

6. The Constitutional Right of "Free Speech" Has No Application Under the Circumstances Here Involved.

Does an ordinance making it illegal for a bookseller to possess or sell an obscene book actually involve "free speech"? This court has held that "obscenity is not within the area of constitutionally protected speech or press" (*Roth v. United States-Alberts v. California*, 354 U. S. 476; see also *Cantwell v. Connecticut*, 310 U. S. 296), and it is only "obscenity" with which this case is involved. On this alone it should properly be held that "free speech" is not involved.

But ignoring this basic fact, and in trying to group the elusive thought or principle that would reconcile the views expressed in all the opinions, it is necessary to look at the forest, as well as the trees. What is the nebulous but controlling principle or law that can resolve all the differences, and unite into a common understanding what must be the basic purpose of all the opinions: that of protecting "free speech" without licensing obscenity?

An analysis of the law as established by statute and prior decisions of this court establishes that there has not heretofore been any irreconcilable conflict between the two objectives of preserving "free speech" and preventing the commercial exploitation of obscenity.

First of all, the law and the cases, properly analyzed, establish that "free speech" is a personal right. The cases which are landmarks on the path of "free speech" involve the personal exercise of a personal right:

Herndon v. Lowery, 301 U. S. 242 (Right of defendant to speak in favor of organizing communist party);

Watkins v. United States, 354 U. S. 178 (Right of defendant *re* taking oath);

Sweezy v. New Hampshire, 354 U. S. 234 (Right of defendant to refuse to answer questions);

Hague v. C. I. O., 307 U. S. 496 (Right of defendant to distribute handbills and do other union organizing work);

Carlson v. California, 310 U. S. 106 (Right of defendant to carry banner and picket);

Schneider v. Irvington, 308 U. S. 147 (Right of defendant to distribute handbills);

Taylor v. Mississippi, 319 U. S. 583 (Right of defendant to criticize our participation in war);

Murdock v. Pennsylvania, 319 U. S. 105 (Right of defendant to distribute religious tracts).

In the instant case no one could for a moment contend that the "free speech" of defendant was in any manner interfered with or inhibited. He claimed that he had never read the book involved. To him the book was only a commodity, merely a piece of merchandise, that he had in stock. He had never adopted the expressions of the author as his own.

If "free speech" could be involved in such a circumstance, it certainly was not a defense available to the defendant. It is fundamental that:

> "One attacking the constitutionality of a statute is not the champion of any rights, except his own." (Justice Cardozo, *Hemmeford v. Silas Mason Co.*, 300 U. S. 577; also see *Frank L. Young Co. v. McNeal-Edwards Co.*, 283 U. S. 398, and *Bode v. Barrett*, 344 U. S. 583.)

By its decision in this case, this Court has granted immunity to the defendant by attaching to him the illusory appendages of a vested property right of another.

The defendant in this case was only engaged in the business of selling property, he was not engaged in the exercise of his right of "free speech." Freedom of speech gives the defendant the right to say what he is thinking. Was the defendant prosecuted for what he said? No! Did he even know what was said in the book here involved? No, not if we believe his testimony!

It is neither morally nor legally right that he should be able to rely on "free speech" to escape liability for handling obscene matter as a part of a commercial transaction. He was not concerned with any ideas, opinions, or beliefs that might be expressed in the book—he was not even interested enough to read it. Nor was he interested in personally expressing any ideas, opinions, or beliefs—all he was interested in was making money regardless of the impact on the public of the method used to make such money.

7. Free Speech Cannot Be Here Involved in View of the Copyright.

Although the matter was argued, none of the opinions refer to the fact that the book was copyrighted, and that the publisher owned the copyright. Yet this is of vital significance.

"Free speech" is diametrically opposed to the optional protection available under the copyright laws.

The Fifth Amendment, as construed by this Court, gives to a person the right to refuse to speak; the First Amendment gives him the right to freely express his thoughts, opinions, and beliefs; the copyright law gives him the privilege—at his option—of reducing his thoughts, opinions and beliefs to property. Therefore, with respect to thoughts, opinions or beliefs, a person may keep them to himself by remaining silent; he may express them to the world by exercising his right of free speech; or he may create a vested property right by availing himself of the copyright law.

If a person avails himself of the privilege of copyrighting his expressions, then "free speech" is not and cannot be involved.

"Free speech" is a personal right, it cannot be bartered away. In fact, there would be no purpose in attempting to do so, as the person who purports to acquire such right from another would have no greater right than that which he already possessed—his own right of "free speech." And, as a corollary, if that which is copyrighted is still subject to "free speech," then a copyright is a nullity as the constitutional right of free speech would give to all the right to repeat and use the thoughts and expressions which had been copyrighted. But because a copyright changes the nature of what is expressed from

that of "free speech" to property, it can be bartered away.

In the instant case that which had been written was copyrighted and the publisher now holds the copyright. The writing had therefore been changed from "free speech" to property. No one except by permission of the copyright owner may repeat such expressions; that is, use the property. The bookseller himself had no right to repeat what was said in the book, the sole right to do so was a property right owned by the publisher. The author had no right to repeat what he had said, he had sold the right to the publisher. Only the publisher had a right to repeat what was in that book! Further, the owner of the copyright need not make available to the public what has been copyrighted. As this Court stated:

> "The owner of a copyright, if he pleases, may refrain from vending and licensing, and content himself with simply exercising the right to exclude others from using his property." (*Fox Film Corp. v. Doyal*, 286 U. S. 123.)

Is this then the exercise of "free speech"? Does "free speech" end with the first expression of a thought, opinion, or belief? This alone should demonstrate that "free speech" cannot properly be an issue where copyrighted material is involved.

As this Court further stated:

> "A copyright is the *property* of the individual owner, because it is a right exercised by the owner during a definite term of years *exclusively for his own profit* and forms the basis for extensive and profitable enterprises." (*Fox Films v. Doyal, supra.*)

Is this the right which so transcends all others in importance that rather than restrict it we would pollute the streams of commerce and poison the minds of the susceptible?

Another distinction between a copyrighted work and "free speech" is that by a copyright notice is given to the public that the owner of the copyright "has not abandoned his work or dedicated it to the public." Yet the very purpose of the right of "free speech" is to enable a person to give to the public—to tell the world—his thoughts, his opinions, his beliefs.

Still another difference is that the historic and traditional concept of "free speech" and the necessity for granting the right of "free speech" is to enable a person to express an unpopular thought, opinion or belief. A constitutional guaranty of free speech is not necessary to enable a person to express a popular thought, opinion, or belief. But a copyright is to protect the profits that can be made from a work that is popular.

The necessity for the right of "free speech" becomes increasingly greater as the thought, opinion, or belief becomes less popular; conversely, the value of a copyright increases with the popularity of the work copyrighted.

"Free speech" is the right to *freely* express thoughts, opinions, and beliefs, it does not include the right to commercially exploit what has been expressed. Conversely, a copyright is not for the purpose of expressing thoughts, opinions, or beliefs; it is for the purpose of changing to

property what has been expressed so that it may be commercially exploited.

The election is at the option of the author. He may have free speech, or he may have a property right. He cannot have both. The two are inimical.

None of the occasions for which the right of "free speech" was intended will in any way be adversely affected by properly construing their right as not including copyrighted material:

(a) Would the recognition of this distinction prevent or interfere with efforts to organize unions or political parties?

(b) Or the distribution of handbills?

(c) Or the right to picket?

(d) Or to carry a banner?

(e) Or to make speeches or write articles attacking or defending existing beliefs or office holders, or advocating political, social, religious or economic changes or reforms?

Neither would the owner of a copyright be unprotected. He would have the full protection of the Fourteenth Amendment: he could not be deprived of such property, including the right to reasonably use his property gainfully such as by sales of copies of the copyrighted works, except by due process. Therefore, unless reasonably required in the public interest, the right to sell copies of the copyrighted works is fully protected. But the State could stop the sale of obscene matter, such as was attempted by the ordinance here involved.

Conclusion.

It is respectfully submitted that a rehearing in this cause should be granted for the foregoing reasons.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

PHILIP E. GREY,
Assistant City Attorney,

WILLIAM E. DORAN,
Deputy City Attorney,

By ROGER ARNEBERGH,
City Attorney,

Attorneys for Appellee, People of the State of California.

Certificate of Counsel.

I, ROGER ARNEBERGH, Counsel for the above-named appellee and petitioner for rehearing, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

ROGER ARNEBERGH,
City Attorney,
Counsel for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 9

ELEAZAR SMITH,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITION FOR REHEARING BY APPELLEE.

J. Elliott Drinard,
City Attorney,
Richmond, Virginia

Dion R. Holm,
City Attorney,
San Francisco, California

Claude V. Jones,
City Attorney,
Durham, North Carolina

Henry P. Kucera,
City Attorney,
Dallas, Texas

Ralph S. Locher,
Director of Law,
Cleveland, Ohio

John C. Melaniphy,
Corporation Counsel,
Chicago, Illinois

Barnett I. Shur,
Corporation Counsel,
Portland, Maine

Charles H. Tenney,
Corporation Counsel,
New York, New York

Charles S. Rhyne,
400 Hill Building,
Washington 6, D. C.

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Interest of Amici Curiae

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of more than eleven hundred municipalities located in each of the fifty states, the District of Columbia and Puerto Rico. Each member city acts through its chief legal officer; known variously as City Attorney, City Solicitor, Corporation Counsel, Director of Law, etc.

This brief is filed pursuant to rule 42(4) of this Court. The members of NIMLO are political subdivisions of states, and this brief is sponsored by their authorized law officers.

The issue decided by this case vitally affects not only the City of Los Angeles but all municipalities which seek to protect the health, morals, and general welfare of their citizens by prohibiting traffic in obscene literature. The case also vitally affects the millions of inhabitants of those municipalities who are able to live and raise families in cleaner and better communities because of ordinances prohibiting obscenity.

It is because of the collective experience of the NIMLO municipalities with the necessity for effective anti-obscenity ordinances, and their awareness of the danger which is posed to their respective communities by the decision in this case, that this brief amici curiae is filed.

Argument

The decision of this Court, rendered on December 14, 1959, holds unconstitutional municipal ordinances which prohibit possession of obscene literature without making a requirement of scienter, *i.e.*, knowledge by the defendant of the obscene contents of the literature.

This holding, if permitted to stand, will cripple municipal efforts to curb obscenity not only in Los Angeles but also in cities across the nation. Because of the virtual impossibility of proving scienter, very few municipal ordinances require knowledge on the part of the defendant of the obscene contents of the literature which he has in his possession. Such a requirement would render the ordinances administratively infeasible. A random check in the NIMLO library of the codes of fifty of the largest member cities * shows that, of forty having anti-obscenity ordinances, not one contains a requirement of scienter.

* Akron, Ohio; Atlanta, Ga.; Baltimore, Md.; Birmingham, Ala.; Boston, Mass.; Buffalo, N. Y.; Charlotte, N. C.; Chattanooga, Tenn.; Chicago, Ill.; Cincinnati, Ohio; Cleveland, Ohio; Dallas, Texas; Dayton, Ohio; Des

Conclusion

It is earnestly urged that, because of the great value to the municipalities of this nation and to their people of effective ordinances prohibiting traffic in obscene literature, the administrative infeasibility of requiring scienter in such ordinances, and the widespread impact of the decision in this case, the Court should grant the Appellee's Petition for Rehearing.

Respectfully submitted,

J. Elliott Drinard,
City Attorney,
Richmond, Virginia.

Dion R. Holm,
City Attorney,
San Francisco, California.

Claude V. Jones,
City Attorney,
Durham, North Carolina.

Henry P. Kučera,
City Attorney,
Dallas Texas.

Ralph S. Locher,
Director of Law,
Cleveland, Ohio.

John C. Melaniphy,
Corporation Counsel,
Chicago, Illinois.

Barnett J. Shur,
Corporation Counsel,
Portland, Maine.

Charles H. Tenney,
Corporation Counsel,
New York, New York.

Charles S. Rhyne,
General Counsel,
NIMLO.

Moines, Iowa; Detroit, Mich.; Erie, Pa.; Hartford, Conn.; Houston, Texas; Indianapolis, Ind.; Jacksonville, Fla.; Kansas City, Kan.; Kansas City, Mo.; Long Beach, Cal.; Los Angeles, Cal.; Louisville, Ky.; Memphis, Tenn.; Miami, Fla.; Minneapolis, Minn.; Nashville, Tenn.; Newark, N. J.; New Haven, Conn.; New Orleans, La.; Norfolk, Va.; Oakland, Cal.; Oklahoma City, Okla.; Omaha, Neb.; Philadelphia, Pa.; Pittsburgh, Pa.; Portland, Ore.; Providence, R. I.; Richmond, Va.; Rochester, N. Y.; San Antonio, Texas; Seattle, Wash.; Spokane, Wash.; St. Louis, Mo.; St. Paul, Minn.; Tacoma, Wash.; Toledo, Ohio; Tulsa, Okla.